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CASES

RELATING TO

RAILWAYS AND CANALS,

ARGUED AND ADJUDGED IN THE

Courts of Law and Equity.

1847 TO 1849.

BY

LIONEL OLIVER, EDWARD BEAVAN, & THOMAS E. P. LEFROY,

ESQUIRES, BARRISTERS-AT-LAW.

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DURING THE

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Lord Langdale	*Master of the Rolls.*
Sir Lancelot Shadwell	*Vice-Chancellor of England.*
Sir Lewis Knight Bruce	*Vice-Chancellors.*
Sir James Wigram	

IN BANKRUPTCY.

Sir Lewis Knight Bruce.

COURT OF QUEEN'S BENCH.

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ERRATA.

Page 211, *last line of marginal note, for* dissolved *read* dismissed.

225, *for* 7 & 8 Vict. c. 3, *read* c. 111.

370, *last line of marginal note, for* mortgage *read* mortgagee.

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* This petition was heard on appeal by the Lord Chancellor, when the judgment of the Court below was reversed, and leave was given to try the question of Hall's liability at law.—Ed.

RAILWAY AND CANAL CASES.

IN THE EXCHEQUER.

Hilary Term, 1848.

1848.

Jan. 28th.

LEE *v.* BARLOW.

Where a member of the managing committee of a railway company undertakes to wind up their affairs, and, by his attornies, who were also the attornies of the Company, possessed himself of the deeds of the Company:—*Held*, that he is bound to grant an inspection of them to any one of the members, at all reasonable times, and that it is no answer to an application for such inspection, that the solicitors claim a lien on them.

THIS was a rule obtained by *Willes* calling upon the defendant and Messrs. Edwards & Mason, his attornies, to shew cause why the plaintiff or his attorney should not be at liberty to inspect and take copies of the parliamentary contract and subscribers' agreement of the Grand Junction and Midland Union Railway Company. A similar application had been made to *Rolfe*, B., who refused to make any order giving the plaintiff leave to move the Court. From the affidavits it appeared that the action was brought for a return of deposits on one hundred shares in the Company, for which the plaintiff had subscribed the parliamentary contract and subscribers' agreement. That the defendant had also one hundred shares in the Company, and had likewise signed the subscribers' agreement and parliamentary contract, and had been advertised in the prospectus of the Company as one of the members of the provisional and managing committee, but had not acted in the management of the affairs of the Company until the 15th of December, 1846. At that period, the scheme having been abandoned for want of funds, it became necessary to wind up the affairs of the Company; and the defendant, with others, assisted in that

1848.

LEE v. BARLOW.

object: that the deeds were, by the late secretary of the Company, delivered into the possession of the solicitors of the Company, who acted as the defendant's solicitors in this cause, and that they claimed to have a lien on them.

Bramwell shewed cause (*a*).—The deeds were signed by the plaintiff and defendant merely as allottees, and they are in the hands of the defendant by his attornies, as one of the managing committee, for the purpose of winding up the affairs of the Company, and for no other purpose; and he not having been one of such committee at the time of its execution, the Court will not compel its production. When a written contract is entered into between two parties, both have an interest in it, and there is an implied agreement that the party having possession of it will produce it when called on. It is on that implied agreement that the Court will compel the production; but here there is no such undertaking, and the Court will not compel a party to produce that which may be his evidence: *Rowe and Others* v. *Howden* (*b*). [*Parke*, B.—Both have signed the deeds and they are in the hands of one; if he holds them as trustee, either express or implied, he is bound to produce them; he has them in his custody for the purpose of winding up the affairs of the Company, and as trustee for all the parties interested; he ought therefore to shew them to all the subscribers, if they want to see them.] It is submitted that this is not so; in an action on a bill of exchange, where the plaintiff and defendant may both be interested in it, an inspection will not be granted. [*Parke*, B.—I have always had grave doubts as to the soundness of that rule; it was established in the time of *Bayley*, B., on the ground that the opposite party should not be allowed to inspect the stamp; the rule was always a matter of surprise to me, and can only be supported as an established rule of practice.]

(*a*) Before *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Platt*, B.
(*b*) 4 Bing. 539 (*n*).

There is no authority for holding, that, because a party has possession of a deed for his own protection, that he is compellable to produce it. [*Parke*, B.—If a man undertake to settle the affairs of a Company, all of the members, primâ facie, have a right to see the deeds.]

Secondly, the defendant's attornies, who happen also to be the attornies of the Company, and, as their attornies, having acquired a lien on the deeds, cannot be compelled to produce them; *Kemp* v. *King* (*a*), *Hunter* v. *Leathley* (*b*); nor can the defendant, the deeds not being under his control. [*Parke*, B.—If parties have a duty to perform they cannot part with the subject of it, and give to others a lien, so as to deprive the cestui que trust of it.] But it is not the defendant who has given the lien, it is the Company, and if the attornies are compelled to allow an inspection their lien may be inoperative. [*Alderson*, B.—I recollect a case in which I appeared before Lord *Tenterden*, and we had possession of a deed on which my client had a lien, the value of which would be entirely done away with by its production, yet Lord *Tenterden* held that we were bound to produce it.] At any rate, the plaintiff ought to have applied to the Court earlier. The reason for granting an inspection is, that the plaintiff may declare, and having declared, he is now too late in his application. [*Parke*, B.—If you hold deeds as trustee for another, he may see them whenever he likes, so that the time be reasonable.] It is submitted that the Court ought not now to assist the plaintiff, but ought to discharge the rule.

PER CURIAM.—We think otherwise.

Willes, contra, was not called on.

Rule absolute.

(*a*) 2 Moo. & R. 437; S. C., Car. & M. 396. See *Steadman* v. *Arden*, 15 M. & W. 587.

(*b*) 10 B. & C. 858.

1847.

IN THE EXCHEQUER.

Hilary Term, 1847.

Jan. 20. CHILTON *v.* THE LONDON AND CROYDON RAILWAY COMPANY.

The 5 Will. 4, c. x, s. 106, empowered the Company to make bye-laws for the good government of their affairs, and for the management of the undertaking and of their officers and servants, "and to impose and inflict such reasonable fines and forfeitures upon all persons offending against the same as to the said Company shall seem meet, not exceeding the sum of £5 for any one offence; such fines and forfeitures to be levied and recovered as any penalty may by this act be levied and recovered;" such bye-laws to be "binding upon and be observed by all parties," provided they were not repugnant to the laws of England, or the directions in the act contained. Sect. 148 empowered the Company to make orders and regulations for regulating the travelling upon the railway, and for or relating to travellers passing thereon, to be binding upon such travellers, on pain of forfeiting a sum not exceeding £5, which the Company shall attach to a default; sect. 163 enacted, that the penalties and forfeitures inflicted by the act, or by any bye-law, order, or rule made in pursuance thereof, might be recovered in a summary way by adjudication of justices, one half of the penalty to be paid to the informer, and the other half to the Company; sect. 165 authorised any officer of the Company to seize and detain any person whose name and residence should be unknown to such officer, *who should commit any offence against the act*, and to convey him before a justice without any warrant or other authority than that act. The Company made a bye-law that each passenger on booking his place should be furnished with a ticket, to be delivered up before leaving the Company's premises, and that each passenger not producing or delivering up his ticket on leaving the Company's premises should be required to pay the fare from the place whence the train originally started:—*Held*, that, assuming this to be a valid bye-law—of which quære—it was not a bye-law imposing a penalty or forfeiture; therefore, that the non-production of a ticket by a passenger who had been furnished with one, on leaving the Company's premises, and his refusal to pay the fare from whence the train originally started, did not justify his arrest.

Semble, that the only power of apprehension given by sect. 165, is for penalties inflicted by or for offences committed against the act.

TRESPASS and false imprisonment. Plea: That long before, and at the time of the committing of the alleged grievances in the declaration mentioned, the said London and Croydon Railway Company had made and constructed a certain railway, with the appurtenances, for the carriage and conveyance by the said London and Croydon Railway Company of passengers from a certain place, to wit, Croydon, to a certain other place, to wit, London, under and by virtue of a certain act of Parliament, made and passed in the fifth year of the reign of his late majesty King William the Fourth, (reciting the title of this act, and of other acts relating to the

Company), and before the day of the committing of the alleged trespasses, to wit, on &c., the said London and Croydon Railway Company, under and by virtue and in pursuance of the powers and authorities in that behalf given to them by the said acts of Parliament in that behalf, duly made and reduced into writing, under their common seal, under and by virtue of those acts in that behalf, the following orders and regulations for regulating the travelling upon and use of the said London and Croydon Railway, and the times when the same should be open for use, and for or relating to travellers passing upon the said railway, and for regulating the passing upon, using, or working the said London and Croydon Railway, and other works, by the said acts of the said London and Croydon Railway Company in that behalf authorised, or in anywise relating thereto respectively; that is to say, "no passenger will be allowed to take his seat in or upon any of the company's carriages, or to travel therein upon the said railway, without having first booked his place and paid his fare. Each passenger booking his place will be furnished with a ticket, which he is to shew when required by the guard in charge of the train, and to deliver up, before leaving the Company's premises, upon demand, to the guard or other servant of the Company duly authorised to collect tickets. Each passenger not producing or delivering up his ticket will be required to pay the fare from the place whence the train originally started." And the said defendants further say, that the said orders or regulations were, in pursuance of the act of the fourth year of the reign of her now Majesty (*a*), to wit, on the 1st day of June, A. D. 1841, duly laid before the lords of the committee of her Majesty's Privy Council appointed for trade and foreign plantations; and that the said lords, to wit, on &c., duly signified to the said London and Croydon Railway Company their approbation of the said orders and regulations. And the defendants further say, that long before and

(*a*) 3 & 4 Vict. c. 97.

1847.

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Semble, that the only power of apprehension given by sect. 165, is for penalties inflicted by or for offences committed against the act.

TRESPASS and false imprisonment. Plea: That long before, and at the time of the committing of the alleged grievances in the declaration mentioned, the said London and Croydon Railway Company had made and constructed a certain railway, with the appurtenances, for the carriage and conveyance by the said London and Croydon Railway Company of passengers from a certain place, to wit, Croydon, to a certain other place, to wit, London, under and by virtue of a certain act of Parliament, made and passed in the fifth year of the reign of his late majesty King William the Fourth, (reciting the title of this act, and of other acts relating to the

Company), and before the day of the committing of the alleged trespasses, to wit, on &c., the said London and Croydon Railway Company, under and by virtue and in pursuance of the powers and authorities in that behalf given to them by the said acts of Parliament in that behalf, duly made and reduced into writing, under their common seal, under and by virtue of those acts in that behalf, the following orders and regulations for regulating the travelling upon and use of the said London and Croydon Railway, and the times when the same should be open for use, and for or relating to travellers passing upon the said railway, and for regulating the passing upon, using, or working the said London and Croydon Railway, and other works, by the said acts of the said London and Croydon Railway Company in that behalf authorised, or in anywise relating thereto respectively; that is to say, "no passenger will be allowed to take his seat in or upon any of the company's carriages, or to travel therein upon the said railway, without having first booked his place and paid his fare. Each passenger booking his place will be furnished with a ticket, which he is to shew when required by the guard in charge of the train, and to deliver up, before leaving the Company's premises, upon demand, to the guard or other servant of the Company duly authorised to collect tickets. Each passenger not producing or delivering up his ticket will be required to pay the fare from the place whence the train originally started." And the said defendants further say, that the said orders or regulations were, in pursuance of the act of the fourth year of the reign of her now Majesty (*a*), to wit, on the 1st day of June, A. D. 1841, duly laid before the lords of the committee of her Majesty's Privy Council appointed for trade and foreign plantations; and that the said lords, to wit, on &c., duly signified to the said London and Croydon Railway Company their approbation of the said orders and regulations. And the defendants further say, that long before and

(*a*) 3 & 4 Vict. c. 97.

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IN THE EXCHEQUER.

Hilary Term, 1847.

Jan. 20. CHILTON *v.* THE LONDON AND CROYDON RAILWAY COMPANY.

The 5 Will. 4, c. x, s. 106, empowered the Company to make bye-laws for the good government of their affairs, and for the management of the undertaking and of their officers and servants, "and to impose and inflict such reasonable fines and forfeitures upon all persons offending against the same as to the said Company shall seem meet, not exceeding the sum of £5 for any one offence; such fines and forfeitures to be levied and recovered as any penalty may by this act be levied and recovered;" such bye-laws to be "binding upon and be observed by all parties," provided they were not repugnant to the laws of England, or the directions in the act contained. Sect. 148 empowered the Company to make orders and regulations for regulating the travelling upon the railway, and for or relating to travellers passing thereon, to be binding upon such travellers, on pain of forfeiting a sum not exceeding £5, which the Company shall attach to a default; sect. 163 enacted, that the penalties and forfeitures inflicted by the act, or by any bye-law, order, or rule made in pursuance thereof, might be recovered in a summary way by adjudication of justices, one half of the penalty to be paid to the informer, and the other half to the Company; sect. 165 authorised any officer of the Company to seize and detain any person whose name and residence should be unknown to such officer, *who should commit any offence against the act*, and to convey him before a justice without any warrant or other authority than that act. The Company made a bye-law that each passenger on booking his place should be furnished with a ticket, to be delivered up before leaving the Company's premises, and that each passenger not producing or delivering up his ticket on leaving the Company's premises should be required to pay the fare from the place whence the train originally started:—*Held*, that, assuming this to be a valid bye-law—of which quære—it was not a bye-law imposing a penalty or forfeiture; therefore, that the non-production of a ticket by a passenger who had been furnished with one, on leaving the Company's premises, and his refusal to pay the fare from whence the train originally started, did not justify his arrest.

Semble, that the only power of apprehension given by sect. 165, is for penalties inflicted by or for offences committed against the act.

TRESPASS and false imprisonment. Plea: That long before, and at the time of the committing of the alleged grievances in the declaration mentioned, the said London and Croydon Railway Company had made and constructed a certain railway, with the appurtenances, for the carriage and conveyance by the said London and Croydon Railway Company of passengers from a certain place, to wit, Croydon, to a certain other place, to wit, London, under and by virtue of a certain act of Parliament, made and passed in the fifth year of the reign of his late majesty King William the Fourth, (reciting the title of this act, and of other acts relating to the

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Company), and before the day of the committing of the alleged trespasses, to wit, on &c., the said London and Croydon Railway Company, under and by virtue and in pursuance of the powers and authorities in that behalf given to them by the said acts of Parliament in that behalf, duly made and reduced into writing, under their common seal, under and by virtue of those acts in that behalf, the following orders and regulations for regulating the travelling upon and use of the said London and Croydon Railway, and the times when the same should be open for use, and for or relating to travellers passing upon the said railway, and for regulating the passing upon, using, or working the said London and Croydon Railway, and other works, by the said acts of the said London and Croydon Railway Company in that behalf authorised, or in anywise relating thereto respectively; that is to say, "no passenger will be allowed to take his seat in or upon any of the company's carriages, or to travel therein upon the said railway, without having first booked his place and paid his fare. Each passenger booking his place will be furnished with a ticket, which he is to shew when required by the guard in charge of the train, and to deliver up, before leaving the Company's premises, upon demand, to the guard or other servant of the Company duly authorised to collect tickets. Each passenger not producing or delivering up his ticket will be required to pay the fare from the place whence the train originally started." And the said defendants further say, that the said orders or regulations were, in pursuance of the act of the fourth year of the reign of her now Majesty (*a*), to wit, on the 1st day of June, A. D. 1841, duly laid before the lords of the committee of her Majesty's Privy Council appointed for trade and foreign plantations; and that the said lords, to wit, on &c., duly signified to the said London and Croydon Railway Company their approbation of the said orders and regulations. And the defendants further say, that long before and

(*a*) 3 & 4 Vict. c. 97.

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on the day and at the time of the committing of the said alleged trespasses, the said orders and regulations so approved as aforesaid were printed, published, and painted on boards, and fixed and continued on the fronts and conspicuous parts of the London toll-houses or stations of the said London and Croydon Railway Company hereinafter mentioned, and of the several other toll-houses of and belonging to the said London and Croydon Railway Company, and on all other buildings or places at which any rates or tolls were, during all the time aforesaid, collected or paid under or by virtue of the said acts of the said fifth year of the reign of his said majesty King William the Fourth: that the said orders and regulations were, before and during all the time in the said declaration in that behalf mentioned, and from thence hitherto have been, and still are and continue to be, sanctioned and approved of by the said lords of the said committee of her Majesty's Privy Council, and in full force and effect, and unqualified and unrepealed: that under and by virtue of the said acts of Parliament of the said London and Croydon Railway Company in that behalf, and before the day and at the time of the committing the said alleged trespasses in the said declaration mentioned, an account or list of the several rates and tolls, and of the toll or fare of 1*s.* 3*d.* hereinafter mentioned, which the said London and Croydon Railway Company during that time directed and appointed to be taken, and which were payable by virtue of the said act of the fifth year of the reign of his majesty King William the Fourth, was painted on boards, and affixed to and upon and continued upon the said London station or toll-house of the said London and Croydon Railway Company, in a conspicuous place there, and also in large and legible characters, and also upon every other toll-house and building at which the said rates and tolls by the said act of the said London and Croydon Railway Company in that behalf were and are authorised to be collected and received, and on conspicuous parts thereof, and in large and legible characters: that

before and on the day and at the time of the committing of the alleged trespasses, and from thence hitherto, the said fare or toll, to wit, of 1*s.* 3*d.*, was and is the regular fare directed and appointed to be taken by the said London and Croydon Railway Company, and payable under and within and by virtue of the said act of Parliament of the fifth year of the reign of his said Majesty, and a proper and reasonable fare for the conveyance of passengers then or now travelling, or for being conveyed from the said toll-house or station at Croydon aforesaid, to the said toll-house or station at London aforesaid, upon and along or by means of the said London and Croydon Railway, in and by first-class carriages of and belonging to the said London and Croydon Railway Company: that the said London and Croydon Railway Company, before and on the day and at the time of the committing of the alleged trespasses in the said declaration mentioned, carried and conveyed, on and upon and along and in and by means of the said London and Croydon Railway, and in and by certain carriages and engines of and belonging to the said London and Croydon Railway Company respectively, all such passengers as during the time aforesaid offered themselves to the said London and Croydon Railway Company for that purpose, at and for the rates and fares aforesaid, and subject to the said orders and regulations so approved and sanctioned as aforesaid: that the said London and Croydon Railway Company, during all the time aforesaid, and for divers, to wit, twenty minutes before the starting of every train of the said London and Croydon Railway Company from every toll-house of the said London and Croydon Railway Company, and of the particular train hereinafter mentioned, were ready and willing and offered to issue and deliver to the said plaintiff, and to all and to every of such passengers as aforesaid and did, during all the time aforesaid, and do still issue and deliver to all such passengers as aforesaid who would or will accept, receive, or apply for the same, a certain railway ticket, to wit, a rail-

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way ticket describing and directing the particular train, and the class of carriage, and the place or toll-house from which such passenger as aforesaid was, or intended, or entitled to travel as aforesaid, and the fare paid by such passenger as aforesaid, by and for the purpose of the said ticket being produced or delivered upon request as aforesaid by such passenger as aforesaid, to any servant of the said London and Croydon Railway Company duly authorised in that behalf, under and in compliance with and by virtue of the said orders and regulations so made and approved of in that behalf as aforesaid: that just before the said time in the said declaration mentioned, to wit &c., a certain railway train of the said London and Croydon Railway Company, consisting of an engine and divers first class and other carriages of the said London and Croydon Railway Company, for the conveyance of passengers thereby under and by virtue of the said acts of Parliament in that behalf, from Croydon aforesaid, to London aforesaid, originally started from the said toll-house or station of the said London and Croydon Railway Company at Croydon aforesaid, for London aforesaid, and then proceeded from the said Croydon toll-house to divers intermediate toll-houses or stations of the said London and Croydon Railway Company, and then from thence to London aforesaid, along and upon and by means of the said London and Croydon Railway: that the plaintiff became and was a passenger in and by the said train of the said London and Croydon Railway Company, in a certain first-class carriage thereof, and was conveyed and travelled upon and along, and used the said railway and first-class carriage and engine of the said London and Croydon Railway Company, as a passenger to the said London toll-house or station of the said London and Croydon Railway Company: that when the said train arrived, and whilst it continued at the said London toll-house or station of the said London and Croydon Railway Company, at London aforesaid, to wit, on &c., and just before the committing of the said alleged trespasses, and

whilst the said plaintiff, as such passenger as aforesaid, was then occupying the said first-class carriage of the said London and Croydon Railway Company, and before he left the said London and Croydon Railway Company's premises, one Richard Gower, then and still being the servant of the said Company in that behalf, and duly authorised to collect the said railway tickets on the arrival of the said train at the last-mentioned toll-house or station from the said passengers, demanded and requested of and from the said plaintiff as such passenger as aforesaid his said railway ticket so required to be produced and delivered up as aforesaid; yet the said plaintiff did not nor would when requested so to do, or at any other time, produce or deliver up to the said Richard Gower such railway ticket as aforesaid, or any other ticket whatever, and thereupon the said defendant J. Smith, then and still being the duly authorised officer and agent of the said London and Croydon Railway Company in that behalf, then and there requested of him the said plaintiff, to pay to him the said defendant, J. Smith, for and on behalf of the said London and Croydon Railway Company, the said fare of 1*s.* 3*d.*, being the said reasonable and proper fare from the said toll-house at Croydon aforesaid, whence the said train originally started as aforesaid, to London aforesaid, but the said plaintiff, although he had during all the time aforesaid notice of the said several premises, and was then and there shewn a copy of the said orders and regulations, did not nor would produce or deliver up such railway ticket as aforesaid, or any other ticket, or pay the said fare of 1*s.* 3*d.* so payable as aforesaid, when so requested as aforesaid, or at any time before or since; whereupon and by reason of the premises, and by virtue of the said acts of the said London and Croydon Railway Company in that behalf, and because the said plaintiff's name and residence was before and at the said time when &c., unknown to the said defendant, J. Smith, he the said defendant, J. Smith, as the officer and duly authorised agent in that behalf of the said London and Croydon

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Railway Company, and the Croydon Railway Company, by and through the said defendant J. Smith as their officer and agent as aforesaid, committed the alleged trespasses in the said declaration mentioned and not otherwise, as they lawfully might for the cause aforesaid, doing no unnecessary damage, and using no unnecessary violence or delay on that occasion. —Verification.

Replication.—That at the said time when he the plaintiff was conveyed in and travelled along and upon the said railway, and used the said railway as in the said plea mentioned, he was not conveyed, nor did he travel as a passenger from the said Croydon station to the said London station, but from a station of the said Company at Sydenham to the said station of the said Company at London: that just before the said time when he became such passenger as aforesaid, to wit, on &c., he took his seat in the said first-class carriage, at the said station at Sydenham, and before he so took his seat he booked his place pursuant to the said bye-law as a passenger by such first-class carriage from Sydenham aforesaid to the said station at London; and that at the same time he then paid to the said Company the sum of 1*s.* as and for and being his fare for travelling in such first-class carriage from Sydenham to London; and that at the said time when he so booked his place and paid his said fare, he was furnished by the said Company with a ticket pursuant to the said bye-law of the said Company in that behalf; and that the said ticket contained the words following:—"First Class, Croydon Railway, Sydenham to London. This ticket must be presented open to the conductor on arrival, or otherwise the fare must be paid." That before the arrival of the said train at London, and before the said ticket was so demanded and requested of him as in the said plea mentioned, he the said plaintiff accidentally lost the said ticket, and by reason thereof the said plaintiff could not produce or deliver up to the said R. Gower the said ticket when requested so to do, as in the said plea mentioned: that at the said time of the making of

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the said request by the said J. Smith to the plaintiff, to pay to the said J. Smith the sum of 1*s.* 3*d.*, the plaintiff was ready and willing, and then tendered and offered to the said J. Smith to pay the said J. Smith the sum of 1*s.* as and for the fare, the same being the proper fare of the plaintiff for so travelling in such first-class carriage from Sydenham to London; of all which the said Company and the said J. Smith at the said time of the committing of the said trespasses had notice.

Rejoinder.—That the said J. Smith had not, before or at the said time of the committing &c., due or proper notice that the said plaintiff was a passenger from the said station at Sydenham, or that he booked his place from Sydenham, or that the said plaintiff had paid to the said Company the sum of 1*s.*, as and for his said fare for travelling from Sydenham, or that the said plaintiff had received any such ticket, as in the said replication mentioned.

Special demurrer.—That the said rejoinder states that the defendant Smith had not due or proper notice of the matters in the said rejoinder in that behalf mentioned, whereas the notice traversed by the said rejoinder was immaterial, and not properly traversable; and that the said rejoinder is otherwise insufficient.—Joinder in demurrer.

The plaintiff's points for argument were, that the rejoinder raised an issue wholly immaterial to the merits: that the fact of the defendants' not having had such notice as is mentioned in the said rejoinder, would not authorise them to commit, or justify them in committing, the trespasses complained of: that the plea is bad in substance: that the orders or regulations published by the Company, and especially that part which declares that each passenger not producing or delivering up his ticket will be required to pay the fare from the place whence the train originally started, as in the plea mentioned, was unreasonable and bad in law, and such as the Company were not by the said acts of Parliament, or any or either of them, or otherwise, authorised to make: that even if such order or

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regulation were authorised by the said acts, or any or either of them, or otherwise, the defendants would not by any law, statute, or otherwise, be authorised or empowered to commit, or justified in committing, the trespasses complained of, for or in consequence of the disobedience or non-observance of or refusal to comply with such order or regulation: that, even if the defendants were justified, under the regulations and acts of Parliament, in taking the plaintiff before a justice of the peace, the plea does not shew any lawful excuse for the imprisonment in the station-house, as charged in the declaration, nor any reason why the plaintiff should not have been taken immediately before a justice of the peace (*a*).

(*a*) The 5 Will. 4, cap. x. (local and personal) incorporates the Company by the name of The London and Croydon Railway Company.

Sect. 106 enacts, "that the said Company, at some general or special general meeting of the said Company, shall have full power and authority, from time to time, to make such bye-laws, orders, and rules, as to them shall seem expedient for the good government of the affairs of the said Company, and for regulating the proceedings, and remunerating and reimbursing the expenses, of the said directors, and for the management of the said undertaking, and of the officers and servants of the said Company in all respects whatsoever, and from time to time to alter or repeal such bye-laws, orders, and rules, or any of them, and to make others, and to impose and inflict such reasonable fines and forfeitures upon all persons offending against the same, as to the said Company shall seem meet, not exceeding the sum of £5 for any one offence; such fines and forfeitures to be levied and recovered as any penalty may by this act be levied and recovered; which said bye-laws, orders, and rules, being reduced into writing under the common seal of the said Company, and printed and published and painted on boards, shall be hung up and affixed, and continued on the front or other conspicuous parts of the several toll-houses to be erected on the said railway, and other buildings or places at which any rates or tolls shall be collected or paid under the authority of this act, and shall from time to time be renewed as often as the same or any part thereof shall be obliterated or destroyed; *and such bye-laws, orders, and rules shall be binding upon and be observed by all parties*, and shall be sufficient in all courts of law or equity to justify all persons who shall act under the same, provided that such bye-laws, orders, and rules be not repugnant to

Peacock, in support of the demurrer (*a*).—The plea is bad for several reasons. First, the bye-law is unreasonable,

the laws of that part of the United Kingdom of Great Britain and Ireland called England, or to any directions in this act contained; and all such bye-laws, orders, and rules shall be subject to appeal in manner hereinafter mentioned."

Sect. 138 enacts, "that if any person shall wilfully pull down, deface or destroy any board which shall have been set or put up or affixed by virtue or in pursuance thereof, or any stone or mark set up to denote distance on the said railway, or shall actually or constructively concur or aid therein, he shall, on conviction, forfeit and pay a sum not exceeding £5 for every such offence."

Sect. 148 enacts, "that it shall be lawful for the said Company from time to time to make such orders and regulations as they shall think proper for regulating the travelling upon and use of the said railway, and the times when the same shall be open for use, and for or relating to travellers or carriages passing upon the said railway, and for or relating to the modes or means by which the speed at which such carriage shall from time to time be moved or propelled, and the times of their departure and arrival, and the loading and unloading thereof respectively, and the weights which they shall respectively carry, and the delivery of goods and other things which shall be conveyed in or upon such carriage; and also for preventing the smoking of tobacco, and the commission of any other nuisance in or upon any such carriages, or in any of the stations or premises occupied by or belonging to the said Company, and generally for regulating the passing upon, using or working the said railway and other works by this act authorised, or in anywise relating thereto respectively; and all such orders and regulations shall be binding upon and be conformed to by the said Company, and by all owners of and persons having the care or conduct of such carriages, and by all persons using or working the said railway and other works, and by all travellers and passengers passing upon the said railway, upon pain of forfeiting and paying a sum not exceeding £5, which the said Company attach to any such default: provided always, that in every case of infraction or non-observance of any such rules or regulations which shall be attended with danger to the public or annoyance to travellers, or which shall obstruct or hinder the said Company in their due and lawful use and working of the said railway, it shall be lawful for the said Company and their agents summarily to inter-

(*a*) Before *Parke*, B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

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and therefore void. In general, the bye-laws of a corporation are not binding on strangers, unless their object be to

fere to obviate such danger, or to remove or prevent such obstruction, nuisance, or hindrance."

Sect. 163 enacts, "that all penalties and forfeitures inflicted or imposed by this act, or by virtue of any bye-law, order, or rule made in pursuance thereof, (the manner of levying or recovering whereof is not herein otherwise particularly directed), may in case of non-payment thereof be recovered in a summary way, by the order and adjudication of some two or more justices of the peace acting within their jurisdiction, on complaint to them for that purpose made," &c.

[Then follows a power of distress:] "all which penalties and forfeitures, not herein directed to be otherwise applied, shall be paid, one moiety to the informer, and the remainder to the said Company, for the use and benefit of the said Company," &c.

Sect. 164 enacts, "that in all cases in which by this act any penalty or forfeiture is made recoverable by information before any justice of the peace, it shall be lawful for the justice of the peace before whom complaint shall be made for any offence committed against this act, or against any bye-law, order, or rule made in pursuance hereof, to summon before him the party complained against, and on such summons to hear and determine the matter of such complaint, and on proof of the offence to convict the offender, and to adjudge him to pay the penalty or forfeiture incurred, and to proceed in the recovery of the same, although no information in writing or in print shall have been exhibited before such justice; and all such proceedings by summons, without information in writing or print, shall be as valid and effectual to all intents and purposes as if an information in writing or in print had been exhibited."

Sect. 165 enacts, "that it shall be lawful for any officer or agent of the said Company, and all such persons as he shall call to his assistance, to seize and detain any person whose name and residence shall be unknown to such officer or agent, who shall commit any offence against this act, and to convey him, with all convenient dispatch, before some justice for the county or place within which such offence shall be committed, without any warrant or authority than this act, and such justice is hereby empowered and required to proceed immediately to the hearing and determining of the complaint."

The 1 Vict. c. xx., sect. 31, enacts, "that the bye-laws, orders, and rules of the said Company, made or hereafter to be made, by virtue of this or the said first-recited act [5 Will. 4], being reduced into writing under the common seal of the said Company, and printed and published, shall, as to such and so much of the said bye-laws, orders, and rules as shall be of a public na-

guard the public against some fraud, or to obviate some general public inconvenience. If the object of the bye-law

ture, and shall relate to or affect other persons than the officers and servants of the said Company, be painted on boards and hung up and affixed, and continued on the front or other conspicuous parts of the several toll-houses to be erected on the said railway, and other buildings or places at which any rates or tolls shall be collected or paid under the authority of this or the said recited act [5 Will. 4], and shall from time to time be renewed as often as the same or any part thereof shall be obliterated or destroyed; and such bye-laws, orders, and rules shall be binding upon and be observed by all parties, and shall be sufficient in all courts of law or equity to justify all persons who shall act under the same: provided that such bye-laws, orders, and rules be not repugnant to the laws of that part of the United Kingdom of Great Britain and Ireland called England, or to any direction in this or the said recited act contained; and all such bye-laws, orders, and rules shall be subject to appeal in manner in the said recited act mentioned; provided always, that no such bye-laws, orders, or rules so made, or any alteration, amendment, or repeal thereof, shall be valid unless the same respectively shall have been allowed by the justices of the peace assembled at any general or quarter sessions of the peace for the counties of Kent and Surrey, or either of them, or by her Majesty's justices of the Courts of Queen's Bench or Common Pleas, or the barons of her Majesty's Exchequer, or by any one or more of the said justices or barons."

By the 3 & 4 Vict. c. 97, intituled, "An Act for regulating Railways," sect. 7, after reciting, "that whereas many railway companies are or may hereafter be empowered by an act of Parliament to make bye-laws, orders, rules, or regulations, and to impose penalties for the enforcement thereof upon persons other than the servants of the said companies, and it is expedient that such powers should be under proper control;" enacts, "that true copies of all such bye-laws, orders, rules, and regulations, made under any such powers by every such Company before the passing of this act, certified in such manner as the lords of the committee of her Majesty's Privy Council appointed for trade and foreign plantations shall from time to time direct, shall within two calendar months after the passing of this act be laid before the lords of the said committee, and that every such bye-law, order, rule, or regulation, not so laid before the lords of the said committee within the aforesaid period, shall from and after that period cease to have any force or effect, saving in so far as any penalty may have been then already incurred under the same."

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be only to protect the corporation, the public are not bound by it. (Com. Dig., tit. "Bye-law," c. 2.) Consistently with this, a person might travel on a railway for ten miles, to the knowledge of the Company's officers; and yet, if he lose his ticket, might be required to pay the fare for a distance of 200 miles. [*Parke*, B.—The ticket might be stolen from the passenger without his fault, by a fellow-passenger.] The record admits that an officer of the Company, a guard, knew that the plaintiff came from Sydenham only. The bye-law was made evidently to avoid the necessity of keeping extra servants to see that no one entered the carriages without paying the fare; but no bye-law can be reasonable which authorises the imprisonment of a passenger on the non-production of his ticket, whether the Company knows from whence he comes or not. There may be an incidental power to a railway company to make bye-laws; but where their power to make bye-laws is defined and limited as it is here by sect. 106, they lose that implied power. In *Child* v. *The Hudson's Bay Company* (*a*), Lord *Macclesfield* says, "A corporation has an implied power to make bye-laws; but where the charter gives the company a power to make bye-laws, they can only make them in such cases as they are enabled to do by the charter; for such power given by the charter implies a negative that they shall not make bye-laws in any other cases." [*Parke*, B.—That decision may be correct, but the principle of it was not acted on in the case of *The King* v. *Westwood* (*b*).] Even if this bye-law be reasonable, they have no power to make it; for the 106th section of the 5 Will. 4, c. 10, which enables them to make bye-laws, contemplates nothing more than the management of the affairs of the Company and their servants; the latter part of that clause, "that such bye-laws shall be binding upon and observed by all parties," applies only to all the servants of the Company. If this bye-law

(*a*) 2 P. Wms. 207. (*b*) 7 Bing. 1.

be binding on strangers, the Company will have power to make, not bye-laws, but public laws; and the effect in this case will be, that the Company will be charging more than 3½*d.* per mile for the conveyance of passengers, though the 127th section prohibits them from doing so. But, secondly, assuming this to be a good bye-law, the Company had no power to arrest or imprison for a breach of it. Section 163 enacts, that "all penalties and forfeitures inflicted or imposed *by the act, or by virtue of any bye-law made in pursuance thereof* &c., may, in case of non-payment thereof, be recovered in a summary way by *order of two or more justices of the peace*, &c., one moiety of such penalty or forfeiture to be paid to the informer and the other moiety to the Company" &c. The 165th section authorises "any officer or agent of the Company to seize and detain any person, whose name and residence shall be unknown, who shall commit *any offence against this act*, and to convey him before some justices &c., without warrant," &c. It is evident that the Legislature intended to limit the power to arrest without warrant to offences created by the act, as destroying boards, &c. The omission to produce a ticket is not "an offence against the act." That may be an offence against the bye-law, cognizable before justices, under sect. 163, in which case half the penalty would go to the informer, whereas here the Company claim the whole of the fare.

Kennedy, for the defendants.—The questions that arise in this case are, first, have the defendants power to make bye-laws binding on strangers; secondly, if they have, is this a reasonable bye-law; and, thirdly, were the defendants justified in arresting the plaintiff, either by statute or the bye-law.

First, the 106th section of the 5 Will. 4, c. 10, shews that this Company, being a public corporation, had power to make bye-laws binding on strangers as well as on its members. It enacts that "they shall have power to make

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such bye-laws, &c., as to them shall seem expedient for the management of the said undertaking, and that "such bye-laws shall be binding on and be observed by all parties." The 8th section of 2 Vict. c. xviii., distinguishes between bye-laws affecting the proprietors and their servants, and such as affect the public, and the inference is from this that the Company have power to make bye-laws binding on strangers. The 7th section of the General Railway Act, 3 & 4 Vict. c. 97, shews that the Legislature considered that such bye-laws affected the public, by requiring them to be laid before the Board of Trade.

Secondly, the bye-law is reasonable. Unless each passenger is provided with a ticket at the place of his entering the carriage, and is bound to deliver it up on quitting it, great delay and public inconvenience and endless fraud will result. [*Alderson*, B.—The bye-law was intended to reach passengers who never had tickets. The check on fraud ought to be by ascertaining that those who get into carriages have tickets.]

Lastly, the defendants were justified in arresting the plaintiff. The sum demanded of the plaintiff was by way of penalty imposed by the bye-law made in pursuance of sect. 106, and the implied contract between the Company and the passenger is, that, if he loses his ticket he pays the fine. [*Parke*, B.—The plea does not state that the plaintiff was taken for the purpose of being conveyed before a magistrate.] That objection is not open on general demurrer. [*Parke*, B.—The Company are not warranted in apprehending the plaintiff unless he has committed an offence against *the act*. If this is not the case of a penalty or a forfeiture, *cadit quæstio*.]

Peacock was not called on to reply.

PARKE, B.—The plaintiff is entitled to judgment. The

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defendant's counsel cannot get over the difficulty that this is not the case of a penalty, but the mere demand of a fare. Any passenger who at the end of his journey does not produce his ticket may have broken his contract with the Company, and be liable to pay the full fare from the most remote terminus. But this is not a penalty or forfeiture under section 163. Then what "offence against the act" is it, on which section 165 can attach? The breach of any bye-law is not within that section. The bye-law may be defective in not making a party under such circumstances liable to a penalty. But if so, the remedy is to alter the bye-law, and to get it approved by the proper authority. As to the other points, it is unnecessary to give an opinion upon them; but I am not much impressed by the arguments of convenience or inconvenience. The plaintiff is entitled to succeed on this plea, as it is plain that the sum demanded of him was a fare, and not a penalty; and the Company had no right to seize or detain him.

ALDERSON, B.—I much doubt whether the 165th section gives the power of apprehending a party, except for offences against the act itself. But if it does, the sum demanded of the plaintiff was not a penalty for which he was liable to be apprehended. It may be reasonable to call on a passenger under these circumstances to pay the full fare, but the question is, how can he be compelled to pay it.

ROLFE, B.—The proceedings to imprison the plaintiff must have been under sections 163 and 165, for the non-payment of his fare, but the omission to pay was not an offence against the act. The act makes it an offence for parties to damage the rails of the Company, and to do other things of a similar kind; and those are the cases in which the Legislature meant that the parties should be liable to be apprehended and taken before magistrates, under section 165.

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PLATT, B.—I am of the same opinion. The 160th section appears to me to have been misunderstood. The Legislature has limited the right of apprehension to those cases where an offence is committed against the act, and where the act itself has imposed a penalty. There are two sorts of penalties and forfeitures; one imposed by the acts, the other by the bye-laws, of the Company. The power of apprehending does not apply to the case of a penalty imposed by a bye-law. There must be

Judgment for the plaintiff.

COURT OF EXCHEQUER.

Easter Term, 1847.

May 8.

PRICHARD *v.* NELSON.

Where parties sue upon contracts arising out of railway projects, the particulars of demand must be as explicit as possible.

ASSUMPSIT for work and labour as an engineer, money paid, and on an account stated. The particulars of demand delivered by the plaintiffs were as follows:—

Between William Bromley Prichard, Plaintiff, and George Nelson, Defendant.

To personally examining the country between Northampton and Warwick, by way of Daventry, Southam, Leamington, and between Napton and Warwick, by way of Leamington; also, siding at Northampton, and siding at Weedon. And also a certain branch from Leam-

ington to Ferry Compton, and another branch between Stockton and the Rugby Railway, all in the counties of Northampton and Warwick; making sundry trial sections; laying out the main line and branches, and alternate line; finding engineers, surveyors, levellers; superintending the same; meeting solicitors, arranging with them, and assisting at the reference; taking all cross sections of the roads and making the proposed alterations therein; getting out the finished plans and sections; furnishing the solicitors with tracings to take reference; meeting solicitors, putting numbers on plans to correspond with the reference, laying out all the gradients and curves on the plans and sections; superintending the engravings, and furnishing the engravers from time to time with the requisite plans and sections; correcting the proofs; sundry meetings with the chairman and committee, of self and assistants; and generally directing and superintending all the different departments of engineering, surveying, levelling, and office work generally, and engraving and lithographing, &c., including tavern charges, travelling charges, material charges, &c., &c.; also including enlarged plans of parts of Northampton, Daventry, Southam, Leamington, and Warwick, and time and expense of surveyors, &c.; assisting the solicitors with book of reference, both in London and the country, &c., as comprised in the following items:—

As regards the London and Birmingham extension from Northampton to Warwick and Ferry Compton branch, and Northampton and Weedon siding, and other deviations therefrom, and different extra work, &c.:—

	£	s.	d.
For assistant surveyors and engineers in the work of engineering and surveying, and services appertaining to the same, between 1st Sept. and 3rd Dec. 1845. Engaged equal to 1000 days .	3217	16	7

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	£	s.	d.
Brought forward . .	3217	16	7
For travelling and personal expenses, and other charges for the engineers and surveyors during the above-named time, and between 1st Sept. and 3rd Dec. 1845	1853	5	7
To sundry inn and tavern charges, posting, and other expenses of self and assistants, engineers, surveyors, messengers, and others, between 1st Sept. and 3rd Dec. 1845	618	19	0
To sundry petty expenses in travelling, for post-boys, gates, toll-bars, messengers, fare by railways, and other expenses of self and assistants, engineers, surveyors, messengers, clerks, &c., between 1st Sept. and 3rd Dec. 1845 . .	141	3	10
For sundry charges for materials, in ordnance sheets, drawings, tracings, mapping, maps, plans, books, and other things and matters, for the purpose of the above surveys, &c., between 1st Sept. and 3rd Dec. 1845	129	5	5
To office work generally, as before described at the commencement, between 1st Sept. and 3rd Dec. 1845	522	0	0
To office work generally, as described, between 3rd Dec. 1845 and 30th June, 1846, including estimates and parliamentary attendance	602	4	0
To different general extras not included in the above, between 1st Sept. and 3rd Dec. 1845 .	160	0	0
For own personal services between 1st Sept. and 3rd Dec. 1845	403	4	0
For parliamentary plans and sections, and other and several matters relating to the "Warwick and Napton Canal Route," and the "Rugby Branch," and certain deviations therefrom, &c., &c., between 1st Sept. and 3rd Dec. 1845	1980	0	0
For expenses and services in respect of the said canal deputations, and other matters, between 1st Sept. and 3rd Dec. 1845	135	17	5
	£9664	0	10

Application for further and better particulars had been made before *Alderson*, B., at chambers, who had referred

the parties to the Court. *Mellor* accordingly having obtained a rule nisi,

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Martin, Q. C., now shewed cause, and contended that, in *Higgins* v. *Ede* (*a*), and *Rennie* v. *Beresford* (*b*), the bills of particulars had been held sufficient, although they disclosed less than that in the present case.

POLLOCK, C. B.—I think you can deliver better particulars than these. You must give them all the information in your power.

PARKE, B.—The cases cited have been objected to, and experience has shewn us that in this class of cases the parties against whom the claim is made, are, in many instances, entirely ignorant, both as to the work and the nature of it. Here the particulars are too general. You should state how many persons were eating and drinking, and how much they had.

ROLFE, B.—The inn and tavern charges are so lumped together, that the defendant cannot possibly make out what he has to defend himself against. At chambers, I am not very strict in requiring minute particulars, provided I am satisfied the party has given the best information in his power, and fairly shewn what he seeks to recover. In this case you should state for whom, and when, and where the inn and tavern expenses were incurred.

PLATT, B.—I think you should also state the number of men employed. Suppose your particulars stated that you

(*a*) 3 Dowl. & L. 464; S. C., 15 M. & W. 76.

(*b*) 3 Dowl. & L. 470; S. C., 15 M. & W. 78.

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had a certain number of men at work on a certain day. The defendant might then be prepared with evidence to prove you had none.

Rule absolute.

COURT OF EXCHEQUER.

In Hilary Term, 1847.

Jan. 14*th.*

WILSON *v.* VISCOUNT CURZON.

The plaintiff, one of the registered promoters of a railway Company provisionally registered, at a meeting of the provisional committee was appointed secretary, and other persons, of whom the defendant was one, managing committee of the Company. The proceedings at this meeting were subsequently confirmed by the defendant: —*Held*, that, upon these facts, there was no evidence for the jury of a personal contract with the defendant, and that the plaintiff and defendant being co-contractors, the former could not recover from the latter for wages as a secretary.

ASSUMPSIT for salary due to the plaintiff as secretary of a railway company; plea, non assumpsit. The cause was tried before Pollock, C. B., at the sittings in Middlesex after Michaelmas Term, 1846, when it appeared that the action was brought to recover the sum of 125*l.*, being six months' salary claimed to be due to the plaintiff, from September, 1845, to March, 1846, as the secretary to a projected company called "The Canterbury and Herne Bay Railway Company." The defendant was a member of the provisional and managing committee. The Company had been provisionally registered under the stat. 7 & 8 Vict. c. 110, and the plaintiff and one Daniel Keene were the promoters. The two following extracts from the books of the Company were put in evidence for the plaintiffs. "At a meeting, at the Guildhall Coffee House, October 15th, 1845. Present [the names of several members of the provisional committee were given, but not that of the defendant].

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"Several resolutions were proposed by the chairman, and seconded by ——, and agreed to, unanimously."

Amongst others were the following:—

"4. That Daniel Keene, Esq., be appointed solicitor to the Company.

"5. That James Wilson, Esq., (the plaintiff,) be appointed secretary to the Company.

"6. That Messrs. Goll & Smith be appointed engineers and surveyors to the Company, and be instructed to proceed in the survey.

"That the following gentlemen be appointed as an acting or managing committee or directory: [Here followed several names, including that of the defendant]: with power to add to their number."

This entry was signed by all the members present, and by the plaintiff as secretary.

The other extract was as follows: "At a meeting held at the Guildhall Coffee House, City, Friday, October 17th, 1845. Present [here followed the names of the defendant and others, the defendant having presided as chairman]. The minutes of last meeting (that of October 15th) were read by the secretary and confirmed." This was signed by all the members present, including the defendant, and by the plaintiff as secretary.

It was proved also, that the plaintiff's salary, as secretary, at the rate of 250*l.* per annum, had been audited and passed at a subsequent meeting of the managing committee.

For the defendant, it was contended, that there was no evidence for the jury of any contract rendering him personally liable to the plaintiff; and that the plaintiff, one of the registered promoters and original projectors of the Company, could not sue any member of the provisional committee for services performed by him in doing things incidental to the formation of the Company. The Lord Chief Baron being of this opinion, directed a nonsuit, with

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leave to the plaintiff to move to enter a verdict for the amount claimed, or any less sum, as the Court might think proper.

The *Attorney-General* (Sir *John Jervis*) now moved accordingly, or for a new trial on the ground of misdirection.—The plaintiff is entitled to recover the amount claimed. The defendant was one of the managing committee, and there is evidence of an express contract by the managing committee to employ the plaintiff as secretary, and pay him a salary for his services. It is clear that the appointment and employment of the plaintiff would be evidence to charge the defendant, were it not for the fact of the plaintiff being a promoter of the Company. What difference then, in the case, does the fact of the plaintiff's being a registered promoter make? The registered promoters and provisional committee-men do not stand in the relation of co-contractors. The plaintiff pursuant to the statute was registered as one of the promoters for the purpose of starting the Company, but when he subsequently took upon himself the office of secretary he wholly divested himself of the character of promoter. [*Parke*, B.—The question is, did the committee contract with him on their own account, or on that of the Company, of which the plaintiff is himself a member? If the latter he cannot recover. It is not to be supposed the plaintiff ever expected to be paid by the defendant. *Alderson*, B.—*Holmes* v. *Higgins* (*a*) appears to me a case in point. There, a number of persons, including the plaintiff and defendant, associated together to obtain a bill in parliament for making a railway. The defendant acted as chairman. The plaintiff was appointed agent, and sued the defendant for work done by him in that capacity. The Court held that the action could not be maintained, as the plaintiff and defend-

(*a*) 1 B. & C. 74.

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ant were joint contractors, and the same person could not be both plaintiff and defendant. *Pollock*, C. B.—*Parkin* v. *Fry* (*a*) is to the same effect: in that case the question was not treated as one of partnership. Lord *Tenterden* says, "I consider the Company as never yet formed: if the gentlemen had sent for the plaintiff to assist them it would have been different, but he is plainly the first mover and instigator of it."] Suppose this were the case of an engineer who had been expressly employed by the committee to make surveys, would he have no right to recover compensation for his services because he had also been a registered promoter of the scheme? [*Parke*, B.—That is a question of fact.] Then the plaintiff is entitled to a new trial. [*Parke*, B.—There can be no doubt that the plaintiff expected to be paid out of the deposits of the shares.] The question is, have not the committee entered into an express contract to pay if funds do not come in?

PARKE, B.—I think no rule ought to be granted in this case, and that there was not such evidence as my Lord Chief Baron could leave to the jury, as constituting a primâ facie case against the defendant. If this were a transaction between ordinary persons, the evidence might be sufficient to make out a primâ facie case against the persons who sanctioned the employment of the plaintiff, that he was to be a paid, and not an honorary secretary; but here we have the additional fact, that the plaintiff is himself one of the original promoters and projectors of the Company. More evidence is therefore necessary than in the case of a mere stranger; and it becomes a question whether he is not so implicated in the scheme, as to render all the acts of the provisional committee his own, and consequently that he is, in truth, one of his own employers. The provisional committee are acting as the delegates of others;

(*a*) 2 C. & P. 311.

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and, primâ facie, any contract they make is made on behalf of those who appointed them; and any orders given by them are likewise the orders of all the projectors, including the plaintiff; he, therefore, was bound to shew that the defendant meant to contract as a principal, independently of his acts as a provisional committee-man. No such intention appears from the evidence in this case; the resolution says nothing about payment of the plaintiff, and it appears that, in fact, it was the intention of all parties these payments should be made out of the subscriptions expected to come in. It is, however, quite sufficient to say, that, as it appeared the plaintiff was a projector of the Company, there was no evidence for the jury of a personal contract with the defendant.

ALDERSON, B.—I also am of opinion there should be no rule in this case. The plaintiff and the solicitor were promoters of the Company, the defendant chairman of a meeting of promoters, when the plaintiff is appointed secretary, another person solicitor, and others, including the defendant, a managing committee: upon these facts it comes to this, that the plaintiff appoints himself; and if he was to be paid at all, which I doubt, he had better go to himself for payment. It is the case of *Holmes* v. *Higgins* over again.

POLLOCK, C. B., and PLATT, B., concurred.

Rule refused.

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IN THE COMMON PLEAS.

Michaelmas Term, 1846.

NEWTON *v.* BLUNT.

Nov. 25th.

Where separate actions are brought against joint-contractors for the same demand, the Court, upon payment of the debt and costs in one action, will stay proceedings in the other actions, without costs.

IN this case a rule had been obtained calling upon the defendant to shew cause why an order of *Cresswell*, J., of the 4th of November, should not be rescinded, or whether the same should not be varied, in such manner as the Court might direct. The order directed that all further proceedings in the action should be stayed without costs: the debt having been satisfied by a joint contractor, with the present defendant. The affidavit upon which the order was made, stated, that a separate action for the same demand had been brought against Andrew Spottiswood, who had paid to the plaintiff the debt and costs in that action. It appeared that the action was brought by an allottee to recover the sum of 78*l.* 15*s.*, being the deposit on thirty shares in a proposed Railway Company,—the Direct Birmingham, Oxford, Reading, and Brighton,—the project having been abandoned; and that the defendant and Spottiswood were two of the provisional directors. The defendant had pleaded the general issue, and notice of trial had been given for the sittings in this term. Upon payment of the debt and costs by Mr. Spottiswood in the action against him, a summons was taken out on the 3rd of November to stay the proceedings in the present action, without costs, and the above order made, on the 4th.

Peacock now shewed cause (*a*), and contended that the debt and costs in this case had actually been paid by the joint

(*a*) Before *Wilde*, C.J., *Maule* and *Williams*, JJ.

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contractor; that the plaintiff was therefore continuing the present action solely for the recovery of costs, to which he had subjected the defendant by his own vexatious proceeding, in bringing several actions, instead of a single action, against the two defendants. That *Carne* v. *Legh* (*a*) was directly in point; there two actions were brought against two joint contractors for the same debt; and upon the debt and costs in one action being paid, the Court set aside the proceedings in the other, without costs—observing: "This being a joint debt the plaintiffs were at liberty to sue all the debtors together, or any one separately, leaving him to plead in abatement, but they had no right to sue all the parties separately for the same demand." He also cited *Pechell* v. *Layton* (*b*), *Peshall* v. *Martin* (*c*), *Henry* v. *Goldney* (*d*), *Mills* v. *Inhabitants of Bristol* (*e*), *Lyttleton* v. *Cross* (*f*), and *King* v. *Hoare* (*g*).

Augustus Newton, contrà, contended that the plaintiff was entitled to costs in both actions; that the defendant had brought the liability upon himself by his own wrong in wantonly resisting that which he now admitted to be a just demand; that *Giles* v. *Tooth* (*h*) was decisive of this case. [*Wilde*, C. J.—The case there was different. The defendants could not safely have been sued jointly, because the liability of each might have been very different in degree.] He cited *Walstab* v. *Spottiswood* (*i*), *Reynell* v. *Lewis* (*k*), and *Wyld* v. *Hopkins* (*l*), to shew that this was a case of joint and several liability, and distinguished *Pechell* v. *Layton* (*m*),

(*a*) 6 B. & C. 124.
(*b*) 2 T. R. 512.
(*c*) 2 T. R. 712.
(*d*) 15 M. & W. 494; 4 D. & L. 6.
(*e*) 3 B. & Ad. 945.
(*f*) 4 B. & C. 117.
(*g*) 13 M. & W. 494.
(*h*) Ante, Vol. 4, 678; S. C., 3 C. B. 665.
(*i*) Ante, Vol. 4, 321; S. C., 15 M. & W. 501.
(*k*) Ante, Vol. 4, 351; S. C., 15 M. & W. 517.
(*l*) Ante, Vol. 4, 359; S. C., 15 M. & W. 517.
(*m*) 2 T. R. 512.

and *Peshall* v. *Martin* (*a*), on the ground that no joint liability existed, and only one penalty was recoverable. In *Carne* v. *Legh* (*b*), it distinctly appeared that the defendants were liable jointly and not severally, and in *Mills* v. *The Inhabitants of Bristol* (*c*), two separate actions were brought for the same cause against the same party.

WILDE, C. J.—The question in this case is, whether the order of my Brother *Cresswell* for staying the proceedings in this action without costs, was properly made. The application to the learned Judge was made upon the ground that the debt had been paid by a joint contractor; and no doubt the order was made upon that ground. If the plaintiff had intended to resist the application on the ground that the parties were separately liable, he should have taken that course at chambers. But he did not do so. From the materials upon which the summons was heard, and those now before us, we must conclude that this was a case of joint liability only; it is unnecessary, therefore, to give any opinion as to whether or not there is any difference in this respect between a joint and a several liability. This, then, is a case where the plaintiff has brought a separate action against each of two persons, in respect of a demand to which they are jointly liable, and one of them has satisfied the plaintiff's demand. It is said that the plaintiff had a right to bring two actions. In one sense he had. But what would be the consequence of bringing two actions? If the plaintiff had gone on to judgment in one of them, the case of *King* v. *Hoare* is an express authority that the judgment might have been pleaded in bar of the second action. What would have been the plaintiff's situation, as regards the costs, if such a plea had been pleaded puis darrein continuance, the judgment having been satisfied in the first action? It has been assumed that, in such case, the plaintiff would have

(*a*) 2 T. R. 712. (*b*) 6 B. & C. 124. (*c*) 3 B. & Adol. 945.

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the costs of the other issue. That, however, is not so. The effect of a plea puis darrein continuance is, to remove all the other pleas from the record. Where a plaintiff recovers no damages, he is not entitled to costs. His demand being satisfied with costs by one defendant, he has no right to costs against the other. All, therefore, that the order does is to do directly by a short and convenient course that which would otherwise have been attained by a more circuitous, inconvenient, and expensive course. No benefit could arise to the plaintiff from allowing the second action to proceed under such circumstances, seeing that he could recover neither damages or costs. It is, therefore, but mercy to him and justice to the defendant to stop the other actions. It is beyond doubt that the Court is sanctioned by authority in the adoption of this course. In *Pechell* v. *Layton*, where two penal actions were brought, one against the sheriff, the other against the bailiff, for the same cause, and the plaintiff obtained a verdict in each action; the proceedings were stayed upon payment of one penalty, and the costs of one action. Many cases have occurred within my experience in which proceedings have been stayed on the ground that they must in the result prove fruitless. What has happened here? Two separate actions have been brought against two persons who are jointly liable, and one of the defendants has paid the debt and the costs in the action against him. The debt having been satisfied, the plaintiff, if he were allowed to proceed, would not recover any damages in the other action, and consequently no costs. I therefore think the learned Judge was right in holding that the defendant in the second action ought not to be harassed by a proceeding from which the plaintiff could derive no possible advantage. It is now said that there might have been a separate as well as a joint liability. Here it is enough, however, to say that the plaintiff, when before the Judge, put his case upon the ground of a joint liability only. For these reasons I am of opinion that this rule must be discharged with costs.

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MAULE, J.—I am of the same opinion. The only question is, was the learned Judge warranted in ordering the proceedings to be stayed without costs. For the reasons given by the Lord Chief Justice, which are perfectly satisfactory to me, I think this must be treated as a case of joint, and not of several liability; though I conceive that would make but little difference. I do not say that the learned Judge might not, even if this had been a case of several liability, have stayed the proceedings on payment of less than the full costs. It is unnecessary, however, to determine that the plaintiff, if he had gone on to judgment in both actions, could only have recovered the debt and costs in one. The payment of the debt and costs in one action extinguishes his demand entirely. The Statute of Gloucester gives costs only where the party is entitled to damages. If the defendant in the second action had pleaded puis darrein continuance the judgment with satisfaction in the first, it would have disentitled the plaintiff to costs; and if so, it ought to have the same effect now. The plaintiff's claim to damages being therefore extinguished, I am of opinion that, whether the liability of the defendant was joint or several, the plaintiff could in no event obtain more costs than he has already received, and that the order of the learned Judge was perfectly warranted.

WILLIAMS, J., concurred.

Rule discharged, with costs.

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IN THE QUEEN'S BENCH.

Trinity Term, 1846.

Feb. 23*rd*,
June 13*th*.

DIMES *v.* The Company of Proprietors of THE GRAND JUNCTION CANAL COMPANY.

By the 33 Geo. 3, c. 80, the Company were empowered to purchase land for the purposes of their canal. Sect. 9 enacted, "that it should be lawful for all bodies corporate, trustees, &c., for themselves, their heirs and successors, and for their cestui que trust, and for every other person or persons whomsoever who should be seised, possessed of, or interested in any lands, &c., set out for the purposes of the canal, to sell or convey the same unto the Company, and such conveyance should be made according to a certain form; then followed a form whereby the vendor granted and released all his right, &c. in the same to the Company for ever, by virtue and according to the true intent and meaning of the act; and it was enacted, that every such conveyance should be valid. Sect. 10 provided, that if the parties should not agree as to the price, it should be settled by certain commissioners, or by a jury. Sect. 30 enacted, that the commissioners should settle what proportion of the purchase-money, or compensation for damage, should be allowed to any tenant or other person having a particular interest in the premises, with due regard to the rights of the lord of any manor.

A., a copyholder in fee, conveyed part of his copyhold lands to the Company, by deed, in the statutory form, the lord being no party to it:—*Held*, that the conveyance transferred all that A. could transfer without the lord, and that the lord's rights remained unaffected, and *semble*, that sect. 30 was meant to apply only to cases where the lord joined in the conveyance.

THIS was a writ of error from the Queen's Bench. The action was in trespass for mesne profits. The pleas were, first, not guilty; secondly, that the *locus in quo* was not the plaintiff's.

The cause was tried before *Abinger*, C. B., at the Summer Assizes, 1840, for the county of Hertford, when the facts of the case were directed to be turned into a special verdict, the material part of which, for the present purpose, is as follows: Joseph Skidmore being seised in fee of copyhold land conveyed to the Grand Junction Canal Company by the form prescribed by their act (33 Geo. 3, c. 80, s. 9), that part of it which was the subject of the present action, to hold to the said Company for ever, by virtue and according to the true intent and meaning of the acts of Parliament passed for making and maintaining the said Grand Junction

Canal (*a*), and the same was in that year formed into and used as part of the canal by the said Company with the

(*a*) The 33 Geo. 3, c. lxxx. and the 41 Geo. 3, c. lxxi. The material sections of the first-mentioned statute enact as follows:—Sect. 9 enacts, amongst other things, "That after any such part or parts of the said lands or grounds shall be so set out and ascertained as aforesaid, for making the said canal and collateral cuts, or any part or parts thereof, &c., it shall be lawful for all bodies politic, corporate or collegiate, corporations, aggregate or sole tenants for life or in tail, husbands, guardians, trustees and feoffees in trust, committees, executors, administrators, and all other trustees or persons whomsoever, not only for and on behalf of themselves and their heirs and successors, but also for and on behalf of their cestui que trusts, whether infants, issue unborn, lunatics, idiots, femes covert, or other person or persons, and to and for all femes covert who are or shall be seised, possessed, or interested in their own right, and for every other person or persons whomsoever who is, are, or shall be seised, possessed of, or interested in any lands, grounds, and hereditaments, which shall be so set out and ascertained for the purposes aforesaid, to contract for, sell, or convey the same, and every part thereof, unto the said company of proprietors." [And after giving a power of sale or exchange of lands separated into small parcels, it proceeds:] "And all such contracts, agreements, sales, conveyances, and assurances, shall be valid and effectual in law to all intents and purposes whatsoever, any law, statute, usage, or custom, to the contrary thereof in anywise notwithstanding: and all bodies politic, corporate or collegiate, and all persons whomsoever so conveying or exchanging as aforesaid, are hereby indemnified for or in respect of any such sale or exchange which he, she, or they, or any of them, shall respectively make by virtue or in pursuance of this act: and all contracts, sales, &c., shall be made according to the form following, videlicet:

"I, A. B., of ——, in consideration of the sum of —— to me paid, [or in consideration of the annual rent of —— to me to be hereafter yielded and paid by yearly or half-yearly payments, as may be agreed upon], by the company of proprietors of the Grand Junction Canal, do hereby grant and release to the said company all [describe the premises to be conveyed] and all my right, title, and interest to and in the same and every part thereof, to hold to the said company for ever, by virtue and according to the true intent and meaning of the act of Parliament passed for making and maintaining the said Grand Junction Canal: in witness, &c. [Then follows a form of conveyance to persons other than the Company] and every such conveyance shall be valid and effectual."

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knowledge of the then lord of the manor through whom the plaintiff became entitled to the manor in 1831. The Com-

Sect. 10 provides, "That all and every body or bodies politic, corporate or collegiate, trustees, or other persons hereinbefore capacitated to sell or convey lands and other hereditaments, or any other owner or owners, and the occupier or occupiers of any lands or other hereditaments, through, in, or upon which the said canal and collateral cuts, towing path, &c., are intended to be made, may accept and receive satisfaction for the value of such lands and grounds, &c., and for the damages to be sustained by making and completing the said works hereinbefore directed, either in gross sums or by annual rents, as shall be agreed upon by and between the said owners and occupiers respectively, or any of them, and the said company of proprietors: and from and immediately after the time of making and executing such sale, and conveyance, or any contract or contracts for the same, the said company of proprietors may and shall be at liberty to enter upon, and from thence for ever to have, take, and enjoy the said lands, grounds, and other hereditaments, for the uses and maintenance of the said canal, &c., without any interruption or eviction whatsoever." [Then followed a proviso, that if the parties should not agree as to the price, it should be settled by certain commissioners, or a jury.]

Sect. 16 enacts, "That the said commissioners shall be and they are hereby authorised and required to examine witnesses, &c., and they are hereby empowered and enabled, by writing under their hands and seals, to determine and adjust from time to time, on any such request and application as aforesaid, what sum or sums of money shall be paid by the said company of proprietors (either in gross or by an annual rent or payment) for the absolute purchase of or as a recompense for the use of the lands, grounds, or hereditaments, which shall be set out and ascertained as aforesaid for making the said canal and collateral cuts, or any part thereof, and for other the purposes herein mentioned: and also to adjust and determine the compensation to be made by the said company of proprietors for any damage which may or shall be at any time or times hereafter sustained by any bodies politic, corporate or collegiate, or by any person or persons respectively, being owners or interested in any lands, grounds, tenements, mills, mines, or other hereditaments, for or by reason of the severing or dividing the same, or by reason of the making, &c. the said canal and collateral cuts respectively, &c."

Sect. 17 enacts, that, if the parties should be dissatisfied with the determination of the commissioners, the value shall be ascertained by a jury, "And such jury shall, upon their oaths, inquire of, assess, and ascertain and

pany took no conveyance of the interest of the lord of the manor, who on Skidmore's death, after the usual proclama-

give, a verdict for the sum or sums of money, or the annual rent or rents, which shall be paid for the purchase or for the hire and use of such lands or grounds, &c., and the compensation which shall be made for the damages sustained as aforesaid; and the said commissioners shall give judgment for such purchase-money, &c. so assessed by such jury, which said verdict, and the judgment thereupon pronounced by the said commissioners, shall be binding and conclusive to all intents and purposes, against all bodies politic, corporate and collegiate, and against all persons whomsoever."

Sect. 21 enacts, That the commissioners shall not be allowed to take notice of any complaint unless application shall have been made to the proprietors within six calendar months next after the time of such supposed injury or damage shall have been sustained, or the doing or committing thereof shall have ceased.

Sect. 25 enacts, "That, upon payment or legal tender of such sum or sums of money, or giving such security as the said commissioners shall approve, for payment of any such annual rent as shall have been contracted or agreed for between the parties, or determined and adjusted by the said commissioners, or assessed by such juries in manner respectively as aforesaid, for the purchase of any such lands, waters, mills, or other hereditaments, or as a recompense for the yearly produce or profits thereof, or as a compensation for damages as hereinbefore mentioned, to the proprietor or proprietors of such lands and premises, or to such other person or persons as shall be interested therein, or entitled to receive such money, rent, or compensation respectively, at any time after the same shall have been so agreed for, determined, or assessed, or if the person or persons so entitled or interested, or any of them, cannot be found or shall refuse to receive the same, then, upon the investiture thereof in the public funds, &c.; and in all or any of the said cases, as often as the same shall happen, it shall be lawful for the said Company of proprietors, their agents, &c., immediately to enter upon such lands, &c.; and then and thereupon such lands, &c., and the fee-simple and inheritance thereof, together with the yearly profits thereof, and all the estate, use, trust, and interest of any person or persons therein, shall from thenceforth be vested in and become the sole property of the said Company of proprietors, to and for the purposes of this act, for ever; and such tender, payment, or investiture shall not only bar all right, title, claim, interest, and demand of the person or persons to whom the same shall or ought to have been made; but also shall extend to and shall be deemed and construed to bar the dower of the wife of every such

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tions, seised the lands till the heir should come to be admitted, recovered possession by ejectment, and then brought the present action for mesne profits. Judgment having been given by the Court of Queen's Bench for the plaintiff on the first issue, and for the defendant on the second, a writ of error was brought on the judgment on the second issue by the plaintiff, and was argued by

Smythies, for the plaintiff. [He was desired to defer his argument on the points now reported until his reply.]

Kelly, Solicitor General, for the defendants.—The important point is, did Skidmore die seised?—if not, the action is not maintainable. It is submitted that the Company took all Skidmore's interest, both legal and equitable, and if so, he did not die seised. By the custom of the manor the right to seise *quousque* depends upon whether the tenant died seised, and if he had parted with his interest he ceased to be a copyholder. It is clear that he had parted with all that he possessed, both at law and in equity, and consequently he did not die seised. [*Rolfe*, B.—Suppose a copyholder in fee conveys by feoffment with livery; that is

person, and all estates tail, and other estates in reversion and remainder, of his, her, or their issue, and every other person whomsoever therein, &c."

Sect. 30 enacts, "That the said commissioners shall and are hereby empowered to settle what share and proportion of the purchase-money or compensation for damages which shall be so agreed for, determined, and adjusted, or assessed in manner respectively as aforesaid, shall be allowed to any tenant or other person or persons having a particular estate, term, or interest in the premises for his, her, or their respective interest therein, and with due regard to the rights and interests of the lord or lords, lady or ladies of any manor or manors, whereof the lands or hereditaments to be affected by the said canal are respectively holden."

Sect. 101 provides, "That nothing herein contained shall extend or prejudice or affect the right of any lord or lords, lady or ladies of any manor or manors, or of any owner or owners of any lands, &c. through which the said canal, &c. shall be made to the minerals under the lands," &c.

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a forfeiture; but the lord may elect not so to treat it, and may still consider him tenant, and on his death seise *quousque*.] There is no authority for that position; but here is a perfect statutory conveyance, which, as to copyholds has the effect of an enfranchisement of them. [*Pollock*, C. B.—It will be said on the other side, that the effect of the proceedings is as if a surrender had been made to the Company, and that they ought to come in and be admitted.] It is submitted that this is not precisely the effect, for supposing that the lord and tenant had joined in the conveyance, the interests of both would have passed, and the lord's rights would have been extinguished. It will be said that the lord has not parted with his interest;—that is so, but his interest has passed under the statute, and he is, under sect. 10, entitled to compensation. [*Maule*, J.—Is not this like a case where land in settlement is taken under the act, and a person entitled to a remote interest has now a right to possession? The question is, whether this operates as a surrender only, or as a surrender and admittance? *Parke*, B. —If your construction is the correct one, where is the clause enabling the lord to compel the Company to buy his interest and pay him the value?—for the case of value and compensation is provided for by the act. There must be some remedy for the lord, unless this is to be considered as a parliamentary surrender.] The compensation clauses are to be largely construed in favour of persons whose rights are affected, and the lord's remedy is under those clauses; *The Queen* v. *The Eastern Counties Railway Company* (*a*).

Smythies, in reply.—As to whether all the right of Skidmore, both at law and in equity, passed by the conveyance, the judgment of the Queen's Bench, which on this point was for the plaintiff, has been recognised and approved by the *Lord Chancellor* and *Vice-Chancellor*; *Dimes*

(*a*) Ante, Vol. 2, 736; *S. C.*, 2 Q. B. Rep. 347.

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v. *Grand Junction Canal Company* (*a*). It is argued that the parliamentary conveyance operates as a surrender and admittance, and that the general provision for compensation for all injuries to land includes this case. But it is submitted that nothing passed to the Company but what Skidmore could himself convey, and that the lord's interest has not been affected.

This appears from sect. 21, which provides that the claim to compensation must be made within six months; a provision inapplicable to the case of a conveyance, of which the lord has no notice, and obviously intended to apply to visible injuries to land, for which an action on the case might lie. The statute provides two forms of conveyance, one to the Company, and one to individuals, and gives the same effect to each; if, therefore, an admittance be included in the one case, it is in the other: now, in the case of individuals, compensation to the lord is not provided for, and it is admitted, that in that case it was not intended that the lord's interest should be affected without compensation; but in truth the compensation provided for is for injuries to land, not to tenure. This construction is supported by sect. 7 of 41 Geo. 3, c. lxxi., amending the 33 Geo. 3, c. lxxx., which enacts, that all future contracts for purchases of copyhold land, by virtue of the powers of that or the former act, made of any copyhold lands, "shall be executed and completed by surrender thereof in the court of the manor of which the same is or are holden, according to the custom of such manor; and such lands, tenements, and hereditaments shall continue subject to the same fines, &c. as are due and payable, and of right accustomed, in the same manner as if this act had not been made, unless the lord &c. shall be willing or desirous of enfranchising the same," &c., assuming a statutory conveyance of copyholds under the said act to be incomplete without surrender and

(*a*) 2 Jur. 886, 1078.

admittance. If there be any doubt on the construction of the statute the Company is the party to suffer. *Webb* v. *The Manchester and Leeds Railway Company* (*a*), *The Earl of Harborough* v. *Shardlow* (*b*), *Scales* v. *Pickering* (*c*).

TINDAL, C. J., (after stating the special verdict), continued:—On the argument of this case all the questions arising in it were fully and elaborately discussed. We have considered them, and are of opinion that the plaintiff in error is entitled to judgment. The principal question was as to the effect of the conveyance executed by J. Skidmore, in the form given by the statute 33 Geo. 3, c. 80, s. 9, by which he granted and released all his right, title, and interest to the Company, for a sum of money paid to him. It was contended, on the part of the Company, that the effect was to transfer all Skidmore's interest to the Company, so that he was no longer tenant to the lord, and therefore did not die seised of the tenement at the will of the lord, according to the custom of the manor; that the lord's title was barred, and that, for the loss of the benefit derived from it, his only remedy was by applying for compensation under the act; and that, at all events, if his title continued he could not seize *quousque* for the default of his infant tenant in not coming to be admitted. The counsel for the plaintiff, on the other hand, insisted that the effect of the statutory conveyance was only to transfer such interest as the tenant himself could transfer without the concurrence of the lord; that it operated in the nature of a surrender; that, until the admittance of a new tenant, the old one continued seised; that the lord was not bound to accept a corporation as his tenants, for he would thus be deprived of the fruits of his seignory, and, consequently, that he could proceed, on the death of the tenant Skidmore,

(*a*) Ante, Vol. 1, pp. 576. (*b*) Ante, Vol. 2, p. 253.
(*c*) 4 Bing. 448; *S. C.*, 1 M. & P. 195.

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in the usual way to compel his heir or devisee to be admitted, and on his not appearing to seise *quousque*, though the tenant was an infant; and that he could, after seizure, maintain his ejectment, and was not bound, or indeed entitled, to claim compensation under the act.

And we think that the conveyance of the tenant transfers all that the tenant could transfer without the lord, but no more; the lord's title remaining as before. It was, probably, by an oversight that the framers of the act did not expressly include copyholds, and provide for the interest of the lord. In a subsequent statute, 41 Geo. 3, c. 71, the legislature has done so, and a similar provision has been made in various railway acts, and others mentioned in the argument; but we think sufficient appears in this act to include every species of title and tenure, and have no doubt but that the lord would have been bound, and the title of the Company complete, if he and the copyhold tenant in fee had joined in, or each separately made, a conveyance in the statutable form; but if the tenant made a conveyance without the lord, it is impossible that he can be considered as representing the lord, or that the lord's right could be thereby transferred. The 30th section of 33 Geo. 3, c. 80, upon which reliance was placed, directs the commissioners to settle the shares of purchase-money, or compensation for damages, to be allowed to persons having a particular estate, for their interest, with a due regard for the rights and interest of the lord of the manor. This section may be meant to apply to cases where the lord joins in the conveyance; at all events, the clause is too uncertain to take away his right; and it is to be recollected, that it is the Company which is to suffer by the vagueness and obscurity of their act. On an argument, upon a motion in the Queen's Bench for a new trial in the ejectment, the late Mr. Justice *Littledale*, and my brothers *Patteson* and *Williams*, were all of opinion, as appears by a manuscript report with which we have been furnished, that the conveyance by the tenant did

not affect the lord's right, and could not possibly operate as a parliamentary enfranchisement; and they directed the verdict to be entered for the plaintiff. It is to be observed that, in the report of their judgments, not the least notice is taken of the objection to the plaintiff's recovering, which has been so strongly placed in argument before us, that the lord could not sue, because he was to receive compensation under the act for the injury to his seignory; and, therefore, it is to be inferred that that point had not been insisted upon by the defendants' counsel; and the view of the case taken by the Court of Queen's Bench was confirmed by the *Vice-Chancellor of England*, who held, that the effect of the bargain and sale was not to convey the legal copyhold estate, but being a conveyance for valuable consideration, the tenant of the estate became trustee of the copyhold for the Company; and the *Lord Chancellor Cottenham* on appeal confirmed this opinion, for he said that the Court of Queen's Bench had decided that the conveyance did not affect the interest of the lord, and it never occurred to him to dispute the judgment of that Court. "The act of Parliament," his lordship observed, "authorised the copyholder to release his right to the Company," and the act says that they should have the same interest as he had; they, therefore, should have a tenancy during the life of the copyhold tenant, and then the lord would enter for want of a tenant. We think, therefore, that no interest passed to the Company, except what the tenant could convey; they chose to rest contented, as they had a right to do, with the title of the copyhold tenant, and not to purchase that of the lord. The consequence is, that they are in a similar situation to that in which they would have been placed if they had chosen to purchase a long term of years from a termor, and leave the reversion in fee outstanding. The reversioner, when the term expired, would have a right to treat the Company, if by its officers it occupied his land, as trespassers, and they would be so until they paid the purchase-money, (*vide* sect.

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25 of 33 Geo. 3, c. 80), and the lord might bring ejectment. So said Lord *Ellenborough*, when a canal company took land limited to one for life, without paying the value of the land or a compensation, and the remainderman applied for a mandamus *The King* v. *Stainforth and Keadby Canal Co.* (*a*); and in like manner, whenever the legal right of the lord of the manor to possession of the tenement begins, the land becomes his estate, and when he has taken possession, the Company are trespassers, unless they choose to purchase what is now the land of the lord. Upon referring to the material clauses of the act, the 5th, 16th, 17th, 21st, 24th, and 25th, it appears to us that the Company are enabled, not bound, to purchase or acquire the right of making the canal on the lands specified in the act, if they choose to do so; they are to pay the price or recompense for the use of the land agreed or assessed by commissioners or a jury, and that before they enter on the land; if they decline, the rights of the landowners remain as before. And as to the damages, those necessarily resulting from the making of the canal, as damages by severance, are to be paid in the same way as the purchase-money for the land; those arising to the adjacent lands, mills, &c., from the making or maintaining or repairing the canal, or its feeders or reservoirs, or the exercise of similar powers, by the oozing of water from the canal, or by the obstruction of watercourses, &c., must be separately assessed and paid, and must be claimed in six months. But the provision for compensation for damage is only for such as is caused to the land itself, by the making or maintaining the canal; and there is no compensation for injury to tenure, nor does the making of the canal in the least injure that. The rights of the lord and fruits of the tenure remain after the making of the canal exactly the same as before, if the copyholder's conveyance did not affect the lord's interest; if it did, that conveyance would have

(*a*) 1 Maule & S. 32.

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injured the lord's manorial rights, not the making of the canal; but as the lord's rights did not pass they remain as before, and as soon as his title to the land itself arises, by forfeiture or otherwise, and he gains possession, he is precisely in the same position as the landowner whose land the Company have not agreed to purchase or take. It appears to us, therefore, that the Court of Queen's Bench took a proper view of this part of the case. The lord retained his right, because he had never been called upon to sell, and had never sold it, and the tenant had no power by the act (and it would have been singular if he had) to sell it for him; and this is not a case for compensation by way of damages.

COURT OF COMMON PLEAS.

Hilary Term, 1847.

BARKER *v.* STEAD.

Jan. 28th.

THIS cause was tried before *Parke*, B., on the Home Circuit, 1846; when the jury found a verdict for the plaintiff for the amount claimed, leave being reserved to the defendant to move to enter a nonsuit if the Court should be of opinion that there was no evidence to go to the jury of the defendant's liability.

The Court of Exchequer having in this term decided two similar cases as to the liabilities of a provisional committee-man, this Court considered themselves bound by those decisions, and refused to hear any argument in a case involving precisely the same point.

The action was brought by the plaintiff, an advertising agent, against the defendant, a provisional committee-man of the Eastern and Northern Counties Junction Railway, for the value of the services of the plaintiff in advertising the project in various newspapers.

It appeared that the secretary of the Company had from time to time given orders to the plaintiff for the advertise-

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ments. The evidence relied upon by the plaintiff to fix the defendant was the fact of his being a member of the provisional committee, proved by his letter to the secretary of the Company, authorising him to insert the defendant's name in the prospectus, as a member of the provisional committee.

Channell, Serjt., having obtained a rule nisi accordingly,

Lush (*Hughes Hughes* with him) now appeared to shew cause, but was stopped by

WILDE, C. J.—Unless you can distinguish this case from *Reynell* v. *Lewis* (*a*), and *Wyld* v. *Hopkins* (*b*), I think we ought not to hear any argument upon it. Those cases were fully argued before the Court of Exchequer, and they, after much consideration, decided that the mere fact of a defendant being a member of a provisional committee amounts to nothing more than that he would, together with others appointed or to be appointed, promote that particular scheme. One of the superior Courts having, therefore, so decided, it is not, in my opinion, for us, a court of co-ordinate jurisdiction, to review that decision, and until the cases I have referred to are reversed, we must consider ourselves bound by them; they must be taken to be the law by this Court, and those decisions must govern this and all similar cases. An opposite course would be inconsistent with the dignity of the administration of justice, and most disadvantageous to the interests of suitors.

Lush admitted that this case was not distinguishable from those cited, whereupon the Court made the

Rule absolute for a nonsuit.

(*a*) Ante, Vol. 4, p. 351; *S. C.*, 15 M. & W. 517.

(*b*) Ante, Vol. 4, 359; *S. C.*, 15 M. & W. 517.

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COURT OF EXCHEQUER.

Easter Term, 1847.

SHAW and Others *v.* ROWLEY and Others. *May 4th.*

ASSUMPSIT. The declaration stated, that, after the passing of an act of Parliament for making a railway from Oxford to Worcester and Wolverhampton, to wit, on &c., by a certain agreement between the plaintiffs and the defendants, the plaintiffs agreed to sell, and the defendants to buy of the plaintiffs, 100 shares in the said Railway Company, at £16 per share. It then averred mutual promises, and that the plaintiffs were at all reasonable times after the making of the said agreement, ready and willing to transfer to the defendants the said shares, whereof the defendants had notice; that on &c. the plaintiffs requested the defendants to accept the said shares and the transfer thereof, and to pay for the same, according to the terms of the said agreement. Breach, that, although a reasonable time elapsed before the commencement of this suit, the defendants did not accept the shares or the transfer thereof, or pay for the same, whereby the plaintiffs lost gains &c. to the amount of £1500, which they might have made by the sale of the said shares.

Pleas—first, non assumpserunt; second, that the plaintiffs were not ready nor willing to transfer the said shares; thirdly, that the defendants had not notice that the plain-

One hundred railway shares were bought by the defendants of the plaintiffs, on the 15th, to be paid for on the 31st of October. On the 14th of October a call was made upon the shares. On the 1st of November the plaintiffs applied to the defendants for a name to be inserted in the deed of transfer. The defendants refused to give one, and finally declined to accept the shares. The plaintiffs had not paid the call upon the shares. The 8 Vict., c. 16, s. 16, prohibits the transfer of shares on which any calls are unpaid.

The plaintiffs sued the defendants for not accepting, or paying for, the shares. On an issue whether the plaintiffs were ready and willing to transfer the shares: —*Held*, that the plaintiffs were entitled to the verdict on that issue, they being in a condition to transfer at any time by paying the calls. *Semble*, per *Parke*, B., a call may be considered as made when a resolution to that effect has been passed by the directors and notified to the shareholders.

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tiffs were ready and willing to transfer the said shares, in manner and form &c.

The cause was tried before *Wightman*, J., at the York Summer Assizes in 1846, when it appeared, that, on the 14th of October, 1845, defendants gave an order to a broker in Leeds, to purchase for them 100 shares in the Oxford, Worcester, and Wolverhampton Railway Company; and on the 15th the shares were purchased by a broker at Manchester, at £16 per share, to be paid for on the 31st of that month. The custom of the Stock Exchange at Manchester was for the vendor to prepare the deed of transfer, and on the 1st of November, the plaintiffs' broker applied to the defendants' broker for the name of the purchaser, in order that the same might be inserted in the deed. The defendants' broker communicated the letter in question to them, but they, on the 7th of November, declined to give a name, and subsequently, on a formal tender of the shares being made, refused to accept them. On the 14th of October, at a meeting of the directors a resolution was passed for making a call of £10 per share. Notice of that resolution was advertised in the newspapers and communicated by letter to each shareholder on the 16th. The 8 Vict., c. 16, s. 16, the Companies Clauses Consolidation Act enacts, that "No shareholder shall be entitled to transfer any share, after any call shall have been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him." The plaintiffs did not pay the amount of the calls due upon the shares; it was therefore contended, on the part of the defendants, that the plaintiffs were not in a condition to make a transfer of those shares, and, consequently, that the issue on the readiness and willingness of the plaintiffs to transfer the shares, ought to be found for the defendants. His lordship being of this opinion, directed a verdict for the defendants on the second plea, reserving leave to the plaintiffs to move to enter a verdict for them on that issue.

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Martin having obtained a rule nisi in Michaelmas Term,

Knowles, *Baines*, and *Farrer* now (*a*) shewed cause.—The verdict for the defendants must stand. The plaintiffs having failed to pay the calls which became due before the settling day, it was not in their power to transfer the shares to the defendants, and, consequently, they would not be ready and willing to do so. The Court so held in *Hibblewhite* v. *M'Morine* (*b*), although the case was not decided upon that point. That a call had been actually made in this instance there can be no doubt, for it was advertised in the newspapers on the 26th of October. The very question as to when a call was to be considered to have been made, arose incidentally in the *Great North of England Railway Company* v. *Biddulph* (*c*) and *The Sheffield and Manchester Railway Company* v. *Woodcock* (*d*). The plaintiffs being the proprietors of the shares at the time when the calls were made, were liable to pay them to the Company. Upon this point *The Aylesbury Railway Company* v. *Thompson* (*e*) is an authority in point, and although that case was questioned in the Court of Common Pleas in *The Aylesbury Railway Company* v. *Mount* (*f*), it was not overruled; the Court, in giving judgment, saying, that they were not called upon to say whether the decision of the Court of Queen's Bench in the former case was correct or not.

Martin and *Cleasby*, contrà, admitting that in this case the call had been resolved upon by the directors, and a circular announcing it was sent to each shareholder. [*Parke*, B.—That, in this instance, constitutes the call.] The plaintiffs have done all that they were bound by their contract to

(*a*) April 29th and May 1st, before *Pollock*, C. B., *Parke*, *Rolfe*, and *Platt*, Bs.

(*b*) Ante, Vol. 2, p. 51; *S. C.*, 6 M. & W. 213.

(*c*) Ante, Vol. 2, p. 401; *S. C.*, 7 M. & W. 242.

(*d*) Ante, Vol. 2, p. 523; *S. C.*, 7 M. & W. 574.

(*e*) Ante, Vol. 2, p. 668.

(*f*) Ante, Vol. 2, p. 679; *S. C.*, 4 M. & Gr. 851.

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do. They were ready and willing to execute the contract as soon as the defendants put them in a condition to do so by paying the calls. The defendants, and not the plaintiffs, were bound to pay the calls. The 16th sect. of the 8 Vict. c. 16 was intended merely for the benefit of the Company. They also cited *Humble* v. *Langston* (*a*). [*Pollock*, C. B.—Your argument is, that the defendants should have paid the calls, and then called upon the plaintiffs to transfer the shares to them. I do not think it seems reasonable to decide that the defendants are to pay the calls, without having any hold upon the vendors excepting the mere right of action against them.]

Cur. adv. vult.

POLLOCK, C. B., now delivered the judgment of the Court.—We are of opinion that the rule in this case to enter a verdict for the plaintiffs should be made absolute. It appears to us that the plaintiffs were perfectly ready to do all that they could be required to do at the time that they asked for the name of the purchaser. It is not necessary that a party should be in the actual condition to perform his contract, it is sufficient if he can place himself in such a situation as to be able to perform it. To put a familiar instance: a party who has goods in bond, contracts to sell them; it is quite clear that he cannot deliver them before he has paid duty if they are to be delivered here; but if the buyer refuses to perform his part of the contract, and the seller thereupon never pays the duty, but enters the goods for exportation, probably in consequence of the breach of contract by the buyer, it could not surely be contended that he might not sue for a breach of contract, because he never was in the actual condition to deliver the goods: he had the power to place himself in that condition at any moment by paying the duty. So, it appears to us, in the

(*a*) 7 M. & W. 517.

present case, that it was in the plaintiffs' power at any time, by paying the call, to transfer the shares. When they asked for the name of the purchaser it was refused, and at that time they were in a condition, by paying the call, to make an actual, valid transfer. The defendants, therefore, cannot now set up the mere impediment which arises out of the call, which call was ultimately to be paid by themselves. We think, therefore, that the verdict ought to be entered for the plaintiffs.

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Rule absolute.

COURT OF COMMON PLEAS.

Hilary Term, 1847.

SCOTT *v.* BERKELEY.

Jan. 27.

TO a declaration in *scire facias*, the defendant pleaded that he was not a member of the Company at the time of the recovery of the judgment.

At the trial of the cause at Guildhall, in the Sittings after Trinity Term, 1845, before *Tindal*, C. J., a verdict was found for the plaintiffs for the full amount claimed, subject to the opinion of the Court upon the following case:—

In the year 1837, several gentlemen associated themselves for the purpose of forming a company, to be called the India Steam Ship Company, for the establishment of a communi-

In 1837, certain persons projected the India Steam Ship Company. Prospectuses were issued, containing, amongst other names, that of the defendant as a director. The defendant attended at the board-room as a director, and official papers were sent thence to his residence, from October, 1837, to March, 1838, but not subsequently. In July, 1838, the Company obtained their act, in which the defendant was named as a director. In July, 1839, a memorial was inrolled, but it did not contain the defendant's name, nor did he execute the Company's deed, although his name was inserted as a director. In November, 1843, a judgment was signed against the secretary, in an action begun on the 15th of April, 1840.

Held, that these facts did not establish that the defendant was a member of the Company at the time of the judgment.

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cation by steam vessels between this country and India, by way of the Cape of Good Hope, and between this country and Australia. They engaged apartments at No. 7, Pall Mall, upon the outer windows of which the title of the Company was announced in large letters; they furnished there a board-room for the directors, they engaged clerks and other servants, and appointed a solicitor, auditors, and bankers to the Company, and issued prospectuses. The prospectuses commenced as follows:—"Prospectus of the India Steam Ship Company, by the Cape of Good Hope. Capital £500,000, in 10,000 shares of £50 each. Directors: A. B., of &c. &c., Esq., Chairman; C. D., of &c. &c., deputy chairman." The Hon. Craven Berkeley, M. P. (the defendant). [Here followed the names of other directors, bankers, &c. &c.]

In the course of the months of October, November, and December, 1837, and January, February, and March, 1838, the defendant from time to time attended as a director at the board-room in Pall Mall, and summonses to attend the meeting of directors, together with all papers issued by the board, and prospectuses, were delivered from time to time in official envelops by the messenger and porter, at the residence of each of the gentlemen who were named in the prospectus as directors, including that of the defendant. The messenger did not leave papers or summonses at the defendant's residence after March, 1838, and the defendant did not attend at the board after that time. On the 31st of July, 1838, the act passed for forming the said India Steam Ship Company (1 & 2 Vict. c. 97). By this act it was, amongst other things, enacted that A. B., the Hon. Craven Berkeley (the defendant), C. D., of &c. &c., and all and every such person or persons, body or bodies politic, corporate or collegiate, who should be or might from time to time become a proprietor or proprietors of any share or shares in the undertaking thereby established, and their respective successors, executors, administrators, and assigns should be, and they were thereby united into a company, by the name of the

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India Steam Ship Company. On the 30th of July, 1839, the secretary of the Company inrolled upon oath in the Court of Chancery a memorial of the names and descriptions of the secretary, and of the several persons being members of the said Company, in the form for that purpose expressed in the schedule to the said act. The defendant's name was not in this memorial. The last meeting of the directors, previous to this inrolment, was on the 6th of March, 1839. From that time they ceased to meet. In the Company's deed (prepared by the solicitor, from instructions given by the directors, in November, 1837), Mr. Berkeley's name was set forth as a director—a seal was placed on the deed for his signature, and his name was written in pencil opposite to the seal for that purpose. He never executed the deed. Fifty shares were required for the qualification of a director. The directors were constituted by themselves. No shares were actually issued. About 1200 were subscribed for. On the 6th of November, 1843, judgment was signed against the secretary in an action commenced on the 15th of April, 1840. The plea in that action was withdrawn, in the bonâ fide belief that there was no defence to the action, and by consent of the parties judgment was entered by confession, upon the 6th of November, 1843, for 35,006*l.* 1*s.* 9*d.*, the amount then due from the Company to the plaintiff. No execution has been had, but by payments since made the debt is reduced to 21,658*l.* 8*s.* 4*d.* The question for the opinion of the Court was, whether, under the above circumstances, the defendant was a member of the Company at the time of the giving and recovering of the said judgment. If so, execution was to issue against the defendant for the sum of 21,658*l.* 8*s.* 4*d.*, if not, a verdict was to be entered for the defendant. The record in the first, and the pleadings in this action, the act of Parliament, and a copy of the memorial, are to form part of the case—the Court to draw such inferences as they think a jury ought to have drawn.

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The plaintiff's points for argument were:—In consequence of the defendant's personal connection with the Company as set forth in the case, and his being named in the act of Parliament establishing the Company, he thereby became and was a member thereof; and he did not cease to be so by reason of his name being omitted in the memorial of the names of the members inrolled by the secretary upon the 30th of July, 1839; that he remained and was a member at the time of the judgment in 1843.

The defendant's points for argument were:—the defendant will contend that he was a member of the Company at the time in question—first, because the Company was not formed or legally existent, as the conditions of the act regarding original capital were never complied with; secondly, that his name was inserted in the act without his authority; thirdly, that his name is not contained in the memorial inrolled; fourthly, that he never was a proprietor of any share or shares in the undertaking.

Greenwood, (*Shee*, Serjt., was with him), for the plaintiff(*a*).—By the 1st sect. of the 1 & 2 Vict. c. 97 (*b*), the

(*a*) Before *Maule*, *Cresswell*, and *Williams*, Js.

(*b*) The material clauses of the act are the following:—The 1st section enacts, that certain persons (naming the defendant among them), and all such persons as shall from time to time become proprietors in the undertaking, "shall be and they are hereby united into a company, by the name of the India Steam Ship Company."

Sect. 6 enacts, "That from and after the passing of this act, all actions, suits, &c., by and against the said Company, may be commenced by and against the secretary for the time being."

Sect. 9 enacts, "That a memorial of the names and descriptions of the several persons being members of the said Company (in the form for that purpose expressed in the schedule hereunto annexed) shall be inrolled, upon oath, in the Court of Chancery, within twelve calendar months after the passing of the act, and when any new secretary shall be elected, and when any person or persons shall cease to be a member or members of the said Company, and when any person or persons shall become a member or members of the said Company,

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defendant is made an actual member of the Company. The words are express, and the power of Parliament is omnipotent. Coke cites many examples of this power (*a*). The defendant is also liable from his personal connection with the Company. He was a party to the issuing of, and his name appeared in, the original prospectus, and until March, 1838, he attended meetings as a director of the Company. Up to that date, also, the messenger delivered, officially, at the house of the defendant all papers issued by the board, and there is no evidence to shew that he has ceased to be a member. The cases of *Nockels* v. *Crosby* (*b*), *Bourne* v. *Freeth* (*c*), and *Dickenson* v. *Valpy* (*d*), which will be relied upon to shew the non-liability of the defendant, on the ground that the capital was never subscribed for, do not apply; they only decide that if the scheme proves abortive, the preliminary expenses must be paid by the original projectors; but this Company was formed and the members

a memorial thereof shall be in like manner inrolled as aforesaid within twelve calendar months," &c.

Sect. 10 provides, "That until such memorial shall have been inrolled, no action shall be brought by the said Company under the authority of this act, and all members whose names shall be expressed in any inrolment to be made in pursuance of this act, shall be and continue liable to all actions, suits, judgments, &c. &c., until a memorial of their having ceased to be members shall have been inrolled as aforesaid."

Sect. 11 enacts, "That execution upon any judgment in any such action obtained against the secretary of the said Company, may be issued against any member for the time being of the said Company," &c. &c.

Sect. 14 enacts, "That this act and the provisions herein contained, shall extend to the said India Steam Ship Company at all times during the continuance of the same, whether the said Company hath been heretofore or shall hereafter be composed of all or some of the persons who were the original members thereof, or of all or some of those persons, together with some other person or persons, or shall be composed altogether of persons who were not original members of the same," &c. &c.

(*a*) 4 Inst. 36, 37.

(*b*) 3 B. & C. 814.

(*c*) 9 Id. 632.

(*d*) 10 Id. 128.

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of it constituted by act of Parliament, and whether there were or were not subsequent subscribers, the members of it are liable. There is no evidence to shew that the name of the defendant was inserted in the act of Parliament without his authority, and even if there were, the express enactment of the statute could not be thus avoided. The omission of the name of the defendant from the memorial inrolled in July, 1839, does not free him from liability. He was an original member, and therefore liable without his name being in the memorial. The original members were clearly responsible for the liabilities incurred in the period before and after the passing of the act, and up to the time of the inrolment. Sect. 6 of the act is decisive upon that point. If the defendant be discharged from his liability by the omission of his name from the memorial, this consequence must follow, that a company like this might, during the twelve months before inrolment, have incurred enormous liabilities, and then, by inrolling the names of insolvent parties, free themselves from all liability. The plaintiff relies upon the act of Parliament, which makes the defendant a member, and by sect. 10 he must remain so until memorialised out of the Company. As to the omission of the defendant's name from the memorial, the memorial itself is invalid, for it was inrolled before anything was subscribed. Under these circumstances the Court will not hold the persons so inrolled liable to, and the original members of the Company omitted wholly discharged from, all the engagements. The contract was with the Company; the action and the judgment are against the Company. The defendant is shewn to be a member of the Company, and he is therefore liable. [*Maule*, J.—The Company do not insert the defendant's name in the memorial. This is a sort of admission on their part that he was not a member then.] That may be evidence in his favour as against the Company, but can have no effect in this case, which is an action by a third party. As to the last point for the defendant, that he

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never had any shares, and therefore is not liable—no shares were issued. Is therefore no person liable? No shares could have been issued before the passing of the act, but it is clear that those who then represented the Company were liable for the preliminary expenses, although at that time they could not have been proprietors of shares, for by sect. 6 it is enacted, that from and after the passing of the act the Company may be sued.

Talfourd and *Channell*, Serjts., contrà, were stopped by the Court.

MAULE, J. (*a*)—The question here is, was the defendant a member of the Company on the 6th of November, 1843—the time of the recovery of the judgment? In order to entitle the plaintiff to a verdict, he is bound to make out the affirmative. There are facts and evidence on both sides for a jury, which in this case means for the Court. Against the defendant it appears, that, in 1837, a body of gentlemen, of whom the defendant was one, associated themselves together for the purpose of carrying out the project of the Company; that the defendant attended meetings of the Company from November, 1837, to March, 1838, as a director of the Company, so far as it was then existing, and that he conducted himself as a director, to all intents and purposes, up to that time. The messenger of the Company called at his house, and left him papers relating to the business of the Company, and his name appears as a director in the prospectus issued during that period. But from March, 1838, no fact appears in the case shewing that the defendant continued to act either as a director or member: up to that time he appears to be treated by the Company, acting by their messenger, as a member, but after that period he ceased to

(*a*) *Wilde*, C. J., was absent.

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be so treated. This is some evidence to shew that it was considered by the Company and the defendant that he was no longer to be a member of the Company. Then the act of Parliament, which was passed on the 31st of July, 1838, calls him a member, and that is certainly evidence to shew that he then was so; perhaps it makes him an actual member at that time, but it was competent for him to cease to be so. On the other hand, the directors continued to sit till March, 1839, but the defendant never attended in any way after March, 1838, and from that period the Company treat him, and he treats them, as if he were not a member. The act of Parliament did not make the defendant a member in that sense, that it required an instrument of as high a nature to release him therefrom. There was no deed signed by him, and it was competent for him to dissolve such partnership by parol; and perhaps the best evidence of the existence of such parol agreement is to be found in the acts of the parties. Directions for the preparation of a deed were given in November, 1837, to which directions he was no doubt a party. The deed was prepared, and a place left in it for his signature; this he never gave, nor was it ever tendered to him for that purpose. This is strong to shew that the other members did not consider him as belonging to the Company, or they would scarcely have undertaken all the responsibilities themselves, and absolved him therefrom. With respect to the memorial, if that be evidence in the case at all, it shews that the secretary of the Company, acting under the directors, did not consider him a member, for his name is there omitted; and if the memorial be excluded, then there is nothing whatever since March, 1838, to fix the defendant as a member except the act of Parliament. Admitting that the act makes him an actual member on the 31st of July, 1838, still there is nothing else in the case before us; and I cannot say it is established to my satisfaction that he remained a member of the Company on the 6th

of November, 1843. I think, therefore, the defendant is entitled to the verdict.

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CRESSWELL, J.—The simple question is, are we satisfied upon the facts stated in this special case, that the defendant was a member of this Company at the time that judgment was recovered in November, 1843? There is no question of credit here, or with whom any contract was made; but we are to say as a matter of fact, whether it has been shewn to us that the defendant was at that time a member. He had certainly been a member at one period; but the act of Parliament does not make him a member so as to conclude and fix his liability in the lasting way contended for. Now it appears to me, that the fact of the defendant's not executing the deed, nor attending the meetings, and receiving no papers through the Company's messenger after March, 1838, are strong circumstances to shew that he had ceased to be a member long before the judgment was recovered, and I think it is very far from established that the defendant was a member at the time of the judgment.

WILLIAMS, J., concurred.

Verdict to be entered for the defendant.

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COURT OF QUEEN'S BENCH.

Easter Term, 1847.

April 26th.

Ex parte REYNAL.

In a claim for compensation against a railway Company, the party, by agreement, submitted the matter to arbitration instead of taking the verdict of a jury under the compensation clause of the Company's Act. The deed of reference and the award were silent as to costs:—*Held*, that, although the award was in favour of the claimant, the provisions of the act with regard to costs did not apply.

IN this case, Reynal having certain claims against the West London Railway Company, agreed to submit them to an arbitrator. The Company was instituted by the 6th of Will. 4, c. 79, (but this act was amended and enlarged, and the name of the Company changed as above, by the 2 & 3 Vict. c. 71). The act contained the usual clauses for referring disputes as to compensation to a jury, (sects. 50 & 56), and directed that when the verdict of the jury should be given for the same or a larger sum than should have been previously offered by the Company, the costs of summoning the jury, and of the bond to be given by the party requiring the jury to be summoned, and the expenses of witnesses, should be defrayed by the Company; but in case the verdict should be for less than the sum offered, then half of such costs should be paid by the party with whom the dispute existed, and the other half by the Company. The arbitrator awarded a sum of money for compensation to Mr. Reynal, but both the deed of reference and the award were silent as to the costs of the reference.

Under these circumstances it became a question, whether, an arbitrator having been substituted for a jury by agreement between the parties, the provisions of the act as to costs did not apply to his decision, in the same way as if a jury had given a verdict in favour of the claimant.

Petersdorff, having moved for a rule nisi calling on the

Company to pay the sum found by the award, and the costs of the reference,

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COLERIDGE, J.—The act of Parliament by which the Company is constituted contains the usual clause as to compensation for the purchase of land and damages, and also the usual provisions respecting costs. But the Company in this instance, instead of proceeding under this act, have made an agreement with the claimant that the amount of compensation to be awarded to him should be settled by arbitration, and not by a jury. Neither the deed of submission nor the arbitrator say anything as to costs. This application is founded on the supposition that this is merely the substitution of the arbitrator for a jury, and that the decision of the substituted tribunal has the same effect as to costs as that of the original would have had. I am not of that opinion. I find that the clause of the act in question specifies the nature of the expenses to be paid in cases decided under it. The expenses of summoning the jury, the expenses of the bond, and the expenses of witnesses are mentioned. This assists to induce me to conclude that the present claimant is not entitled to receive costs under the act. *April 29th.*

Rule refused.

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IN THE COMMON PLEAS.

Trinity Term, 1847.

May 27.

DAWSON and Another *v.* MORRISON.

In assumpsit against one of the provisional committee of a Railway Company, for advertising the prospectuses of the Company, it appeared, that there was a provisional committee and a committee of management; that the advertisements were ordered by the committee of management, of which the defendant was not a member; that the prospectus issued by the Company contained a clause that, "until the act shall be obtained, the affairs of the Company shall be under the control of the committee of management for the time being, to whom power is given to allot the shares, and to *apply the funds* of the Company for all the expenses incurred in the formation of the Company," &c.; the jury having found a verdict for the defendant:—*Held*, that the managing committee had no authority, either express or implied, to pledge the credit of the provisional committee, and that the verdict was right.

ASSUMPSIT by an advertising agent against one of the Provisional Committee of the Oxford, Witney, Cheltenham, and Gloucester Independent Extension Railway, for inserting advertisements in divers newspapers.

Plea, non assumpsit.

The cause was tried before *Coltman*, J., at the Summer assizes for Surrey, when it appeared that the advertisements were inserted by the orders of the committee of management; that the advertisements consisted of prospectuses of the Company, giving a list of the provisional committee and of the committee of management, in the former of which committees the name of the defendant was included, but not in the latter. In these prospectuses it was, amongst other things, announced as follows:—"The provisional committee of management now inform the parties to this undertaking, that the preliminary surveys have been completed," and that "until the act of Parliament shall be obtained, the affairs of the Company shall be under the control of the committee of management for the time being, to whom power is given to allot the shares, and to *apply the funds* of the Company for all the expenses incurred in the formation of the Company, and in the preparation of the plans and sections to be submitted to Parliament." There was some

evidence of knowledge by the defendant of the contents of the prospectus. The jury, under his Lordship's direction, found a verdict for the defendant.

A rule having been obtained by *Shee*, Serjt., on the part of the plaintiffs, to set aside the verdict, as being against evidence,

Montague Chambers shewed cause (*a*).—The power of the committee of management was express to *apply the funds* of the Company, and there was no authority to deal on credit, nor was there any express or implied authority to pledge the credit of the provisional committee. He referred to *Wyld* v. *Hopkins* (*b*).

Shee, Serjt., in support of the rule.—The committee of management had a delegated power from the provisional committee to allot shares and to apply the funds of the Company for all the expenses incurred in its formation. [*Maule*, J.—That does not render the provisional committee liable for orders on credit. For you to succeed, the jury would have to find that the managing committee had authority to, and did act on behalf of the provisional committee; all that appears is, that the plaintiffs contracted with the committee of management. The provisional committee define and limit the powers conferred.] The power conferred authorises them to do everything necessary for the establishment of the Company, and consequently to order the advertising of the Company. The jury were not, therefore, warranted in their verdict.

WILDE, C. J.—I entertain no doubt as to the present rule. So far from the jury having done wrong in coming to the conclusion which they have, it would have been

(*a*) Before *Wilde*, C. J., *Coltman*, *Maule*, and *Cresswell*, Js.

(*b*) Ante, Vol. 4, p. 359; *S. C.*, 15 M. & W. 517.

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difficult to support a verdict the other way. It may be assumed that the defendant was a provisional committee-man of the Company: what is shewn further is, that, in a paper, which I cannot adopt as emanating entirely from the provisional committee, but which seems more likely to have been issued by the managing committee, the provisional committee concurring only so far as their not objecting goes, it is said in one of the paragraphs, that "the affairs of the Company shall be under the control of the committee of management for the time being, to whom power is given to allot the shares, and to apply the funds of the Company for all the expenses incurred in the formation of the Company," &c. It is assumed that the authority of the committee of management emanates entirely from the provisional committee. I do not see why this should be assumed any more than that it emanates from the shareholders or subscribers. It probably, in truth, emanates from neither, but from the same source as the existence of the provisional committee themselves is derived, namely, the originators of the Company. Be that, however, as it may; what is the authority given? There is no implied authority, and the express authority is, that the committee of management are to allot the shares, and to apply *the funds* of the Company for all the expenses incurred in the formation of the Company, and in the preparation of the plans and sections. I cannot from this infer the slightest authority given to the committee of management by the provisional committee, to contract on their credit; as it appears to me the terms of the paragraphs negative any authority in the managing committee to contract on behalf of the provisional committee; they rather give notice that the former are not to deal on the credit of the latter; nor is there to be found in the prospectus the slightest authority to the managing committee, to contract on any credit but their own. The effect of the evidence is, that the defendant was a member of the provisional

committee, but by that character there arises no implied authority to the managing committee to contract upon his credit, and as far as the express authority goes it plainly means that they are to contract upon the terms of ready money dealings, and not upon credit. The jury, therefore, having found that the defendant did not give authority to the committee of management to contract upon his credit, I think that the verdict was right.

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COLTMAN, J., MAULE, J., and CRESSWELL, J., concurred.

Rule discharged.

COURT OF EXCHEQUER.

Trinity Term, 1847.

DUKE, Knt., and Others *v.* DIVE.

May 28th.

ASSUMPSIT.—The declaration stated, that the plaintiffs had agreed, together with divers, to wit, two hundred other persons, to endeavour to form a certain joint stock company for the making of a certain railway, to be called the Dorking, Brighton, and Arundel Atmospheric Railway, and to endeavour to obtain an act of Parliament for that purpose:

The declaration stated, that the plaintiffs had agreed with others to endeavour to form a Railway Company; that 2*l.* 2*s.* deposit per share was to be paid by the allottees. That the plaintiffs—the committee of management—allotted shares to the defendant upon the terms of the payment of the deposit by the defendant on or before a stated day, to certain bankers, of all which premises the defendant had notice. The declaration then averred mutual promises—the readiness of the plaintiffs to fulfil their part; and breach by defendant—non-payment of the deposit.

The defendant pleaded, fourthly, a traverse of the plaintiffs' readiness to fulfil their part of the agreement; fifthly, a traverse of the notice of the several premises in the declaration; sixthly, that before action brought the plaintiffs, without the consent of the defendant, abandoned their endeavours to form the Company, and the shares of the defendant were thereby worthless.

Held, on special demurrer to the pleas, that they were bad, and that the declaration was good.

Semble, that the plaintiffs were the proper parties to sue.

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the capital whereof was to consist of 1,000,000*l.*, to be divided into 50,000 shares, of 20*l.* each, and upon which a deposit of 2*l.* 2*s.* for each share was to be paid by such persons to whom the said shares should be allotted by a committee of management; that before and at the time of the defendant's application for shares and the making of his said promise as hereinafter mentioned, the plaintiffs formed the committee of management of the said proposed Company; that the defendant applied to the plaintiffs, and requested them to allot him forty shares, and then undertook to accept the same, or any less number that might be allotted to him; that the plaintiffs allotted to him twenty-five shares, upon the terms that a deposit of 2*l.* 2*s.* upon each share should be paid by him on or before the 9th day of December, 1845, to the account of the said Company, to one of certain bankers then appointed in that behalf, to wit, &c., of all which premises the defendant afterwards, to wit, on &c., had notice. The declaration then averred mutual promises, and alleged, that, although the plaintiffs were always ready and willing to perform and fulfil the said terms in all things on their parts, and although the said 9th day of December elapsed after the said promise of the said defendant, and before the commencement of this suit, of all which premises the defendant hath always had notice; yet the defendant had not paid to any of the said bankers, or to any other person to the account of the said Company, the said deposit of 2*l.* 2*s.* per share.

The defendant pleaded several pleas, but those upon which the case was decided were—fourthly, that the plaintiffs were not always ready and willing to perform the terms in the declaration mentioned in all things on their parts, modo et formâ; fifthly, that the defendant had not notice of the said several premises in the declaration mentioned, modo et formâ; sixthly, that before the commencement of the suit, the plaintiffs and the Company agreed, without the consent of the defendant, that the endeavours to establish the Company and obtain the act, should be

abandoned; that the same were abandoned, and are now, and were at the commencement of the suit, at an end, and the shares allotted to the defendant became utterly worthless. To these pleas the plaintiffs demurred specially, assigning for causes to the fourth plea, that there were no terms which the plaintiffs were bound to perform prior to the performance of the defendant's agreement; that the traverse was too large, as the plaintiffs were not bound to be always ready and willing to perform the said terms, nor in all things, or at all times, inasmuch as the time for the performance of some of those terms had not arrived when the cause of action accrued, and that it was not pointed out which of the terms the plaintiffs were not ready and willing to perform. To the fifth plea, that the traverse was too large in making it incumbent on the plaintiffs to prove that the defendant had notice of all the premises in the declaration, and that it was uncertain what facts the defendant denied having notice of. To the last plea, that the plea did not traverse, nor confess, nor avoid the cause of action, inasmuch as the plaintiffs' abandonment of their endeavours to form a company could not justify the defendant's breach of contract.

Martin, in support of the demurrer (*a*).—As to the fourth plea, it is bad, the traverse being too large. *Tempest* v. *Kilner* (*b*) is in point. [*Alderson*, B.—The averment was superfluous, and the plea traversing it is clearly bad.] The fifth plea is likewise bad, upon the authority of the same case. The last plea is bad. The declaration alleges a breach of contract by the defendant in not paying the deposit on the 9th of December. The subsequent abandonment of the undertaking by the plaintiffs is no answer to this, which was a prior breach of contract on the part of the defendant.

(*a*) Before *Pollock*, C. B., *Alderson*, *Rolfe*, and *Platt*, Bs.
(*b*) Ante, Vol. 3, p. 790.

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G. T. White, contrà.—The fourth plea is good. The traverse only goes to the readiness and willingness of the plaintiffs to fulfil their agreement up to the 9th of December, to which time the plaintiffs were bound to keep an account open with their banker, that the defendant might have the opportunity of paying his deposits. The case is distinguishable from *Tempest* v. *Kilner;* there the time was a divisible allegation, and being so the traverse was immaterial. [*Pollock*, C. B.—The plea in this case does not state what terms the plaintiffs were not ready to perform, and is therefore bad.] The traverse taken by the fifth plea is not too large. The agreement to form the Company, and the condition that 2*l.* 2*s.* should be paid upon each share by the allottees, were conditions precedent to the liability of the defendant to pay the deposit. The traverse does not compel the plaintiff to prove more than this. The sixth plea is good. The abandonment of the scheme has a retrospective operation, and the defendant might therefore recover back the whole of the deposits paid by him: *Walstab* v. *Spottiswoode* (*a*). [*Alderson*, B.—This action is not brought for the recovery of the deposit, but of damages for the non-performance of a promise by the defendant.] The plea is good on the ground of avoiding circuity of action, for in effect this is an action to recover the deposits, and the defendant would succeed if he paid one shilling into court as nominal damages. A plaintiff cannot maintain an action for the recovery of a sum which, if recovered, he would be liable to repay in a cross action: *Carr* v. *Stephens* (*b*), *Simpson* v. *Swan* (*c*). On this point, if the declaration had alleged as special damage that, in consequence of the non-payment of the deposits by the defendant, the plaintiffs were compelled to abandon the project, the defendant would have been in a different position. He

(*a*) Ante, Vol. 4, p. 321; S. C., 15 M. & W. 501.
(*b*) 9 B. & C. 758. (*c*) 3 Campb. 291.

also cited *Walmesley* v. *Cooper* (*a*), *Turner* v. *Davies* (*b*), *Johnson* v. *Carr* (*c*).

But the declaration is bad: it avers an agreement to endeavour to form a company, but contains no allegation that the company was ever formed, or even that there was an endeavour to form it. Besides, it is apparent on the face of the declaration, that the plaintiffs are only part of a larger body, and have no interest separate from the rest of the company, so as to entitle them to sue alone. The defendant's promise was to pay the whole company, and not the plaintiffs, who are only a part of a larger body: *Sims* v. *Bond* (*d*).

Martin was not called on to reply.

POLLOCK, C. B.—The declaration is good on general demurrer, and the pleas are bad for the reasons assigned.

ALDERSON, ROLFE, and PLATT, B.'s concurred.

Judgment for the Plaintiffs.

(*a*) 11 Adol. & Ell. 216.
(*b*) 2 Saund. 149, 150, n. 2.
(*c*) 1 Lev. 152.
(*d*) 5 B. & Adol. 389.

COURT OF EXCHEQUER.

Trinity Term, 1847.

CLARK *v.* NEWSAM and Another. *May 25th.*

TRESPASS and false imprisonment. Pleas, first, not guilty; secondly, that shortly before the commission of the said alleged trespasses the plaintiff delivered to the defendant Edwards, for sale, a certain paper, purporting to be a scrip

A railway scrip certificate, in the usual form, is not an accountable receipt, nor an acquittance or receipt within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 10, and the forgery of it does not amount to felony, but to a misdemeanor, at common law only.

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certificate of fifty shares of the Buckinghamshire Railway, and Oxford and Bletchley Junction, and purporting also to be an accountable receipt for money, to wit, for the sum of 2*l.* 2*s.* per share on the said last-mentioned shares, paid to the said Company by the owner of the last-mentioned scrip certificate as a deposit on the said last-mentioned shares, and purporting to be signed in that behalf by the secretary of the said Company; and the defendant Edwards sold the same and paid the proceeds to the plaintiff; that afterwards the defendants were informed and believed, and the fact was and is, that the said paper or document before mentioned, purporting to be a scrip certificate of fifty shares of and in the said Railway Company, was and had been, feloniously forged by certain persons unknown; wherefore the defendants having good and probable cause of suspicion, and vehemently and sincerely suspecting and believing the plaintiff to have been guilty of the offence of uttering and disposing of the said paper or document, knowing the same to be forged, with intent to defraud certain persons, to wit, the persons associated together in the said provisionally registered Railway Company, gave him in charge of a police constable. Verification.

Replication, de injuriâ.

The cause was tried at the London Sittings after Michaelmas Term, 1846, before *Pollock*, C. B., when it appeared that the scrip certificate mentioned in the plea, and which the plaintiff was charged with uttering, knowing to be forged, and was proved to have been forged, was in the following form:

"1845.

"Scrip,

"Buckinghamshire Railway, (and Oxford and Bletchley Junction).

"Provisionally Registered.

"Capital £2,250,000, in Shares of £20 each, Deposit 2*l.* 2*s.*

No. 101,801 to 101,850.

"The holder of this voucher is entitled to fifty shares in the above undertaking, he having signed the subscribers' agreement and parliamentary contract, paid the deposit as above, and agreed to pay all calls in respect of the said shares. By order of the Provisional Committee of Management. W. Harding, Secretary."

It was contended at the trial, on behalf of the plaintiff, that the before-mentioned scrip certificate was not an acquittance or accountable receipt within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 10, and that the forging of it did not amount to felony, consequently that the plea was not proved.

The Chief Baron directed the jury, that in the event of their finding a verdict for the plaintiff on the first plea, to assess the damages, contingently on the question arising on the second plea, namely, whether the forging of the scrip certificate amounted to felony. The jury found a verdict for the plaintiff, with one farthing damages.

A rule having been obtained by Sir *F. Thesiger* on behalf of the plaintiff to set aside the verdict, and for a new trial—

Watson and *Greenwood* shewed cause(*a*).—The forging of railway scrip is felony within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 10, they being, as it is submitted, either acquittances or accountable receipts within the meaning of the statute, the 10th section of which enacts, "that if any person shall forge, &c. any acquittance or receipt either for money or goods, or any accountable receipt either for money or goods, or for any note, bill, or other security for payment of money, with intent, &c., shall be guilty of felony." This instrument is either an acquittance or receipt for money, or an accountable receipt for money: *Tomkins* v. *Ashby* (*b*).

(*a*) Before *Pollock*, C. B., *Alderson*, B., *Rolfe*, B., *Platt*, B.
(*b*) 6 B. & C. 541.

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The certificate is signed by the secretary, and states that the deposit, 2*l.* 2*s.* per share, has been paid; it is therefore an acquittance within the statute. [*Alderson*, B.—This is not an accountable receipt, nor is it an acquittance or receipt, it is merely a certificate that the holder will be entitled to shares at some future period. The word "acquittance" in the statute is found in connexion with "receipt," which means a receipt which acquits. *Platt*, B.—Suppose the Benchers of an inn of court were to determine not to receive a member of another inn without a certificate of his having paid his dues; according to your argument such a document would be a receipt within the statute.] It is submitted that it would: it is not necessary that it should be a receipt within the Stamp Act: *The Queen* v. *Boardman* (*a*); *The King* v. *Rice* (*b*). [*Alderson*, B.—This instrument is not the subject of forgery within the statute, though it is at common law. Suppose a man had goods in his possession, and it was a question whether he had paid for them or not, and a by-stander certified that he had; could that document be said to be an acquittance or receipt within the statute? It might be different if this were a certificate from the person who received the money.]

POLLOCK, C. B.—We have no doubt that this document is merely a certificate for shares, and not a receipt, and that the forgery of it does not amount to forgery within the statute.

Sir *F. Thesiger*, *Humfrey*, and *Innes*, contrà, were not called upon.

The rule was made absolute on another ground.

(*a*) 2 Mood. & Rob. 147. (*b*) 6 Car. & P. 634.

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COURT OF EXCHEQUER.

Trinity Term, 1847.

VOLLANS *v.* FLETCHER.

May 26th.

ASSUMPSIT for money had and received, and on an account stated.

Plea, non assumpsit.

The action was tried before *Pollock*, C. B., at the London sittings after Michaelmas Term, 1846, when it appeared that the action was brought against the defendant, the chairman of the board of directors, to recover back the amount of deposits on ten shares in the Birmingham, West Bromwich, Wednesbury, and Walsal Junction Railway Company, paid by the plaintiff.

In support of the plaintiff's case the following application for shares and letter of allotment were tendered in evidence:—

"Application for shares.

"GENTLEMEN,—I request that you will allot me thirty shares at £20 each, in the above-named Company: and I hereby undertake to accept the same, or any less number you may allot me, and to pay the deposit of 2*l.* 2*s.* per share thereupon, and sign the parliamentary contract and subscribers' agreement when required.

"(Signed) J. W. VOLLANS."

The letter of allotment sent to the plaintiff in answer to his application for shares was as follows:—

The plaintiff applied by letter for thirty shares in a projected Company, and undertook to accept the same or any less number, and to pay the deposit. The letter of allotment appropriated to him ten non-transferrable shares, and stipulated that the deposit should be paid on a certain day, and in default thereof that the committee should have the power of cancelling the allotment. In an action by plaintiff to recover back the deposit paid on the shares allotted:—*Held*, that these documents did not require a stamp. That the application for shares and letter of allotment did not constitute the contract under which the deposit was paid.

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"Not transferrable.

"Birmingham, West Bromwich, Wednesbury, and Walsal Junction Railway.

"Provisionally registered.

"Capital £200,000, in 10,000 shares of £20 each.

"Deposit 2*l.* 2*s.* per share.

"Allotment No. 348. 10 shares. Deposit £21.

"Birmingham, 29th October, 1845.

"We are directed to inform you that the committee of management have, in compliance with your application, allotted to you ten shares in this undertaking, and that the deposit of 2*l.* 2*s.* per share, amounting to the sum of £21, must be paid to one of the under-mentioned bankers on or before Thursday, the 6th of November next, who upon receipt thereof will sign the voucher at the foot of this letter. In default of payment of the above-mentioned deposit by the day mentioned, the committee reserve the power of cancelling the allotment without notice. This letter with the bankers' receipt must be exchanged for scrip certificates, which will be granted upon your executing the subscribers' agreement and parliamentary contract, without which no person will be recognised as a subscriber, or be entitled to any interest in the undertaking."

The reception of these documents was objected to, on behalf of the defendant, on the ground, that the application for shares and letter of allotment constituting the contract on which the deposit had been paid, ought to have been stamped with an agreement stamp. The Lord Chief Baron being of that opinion, nonsuited the plaintiff, giving him leave to move to enter a verdict for him for £21, or such sum as the Court should direct.

A rule nisi having been obtained by *Martin* pursuant to the leave reserved,

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Crowder and *Ball* shewed cause (*a*).—It was necessary to shew the contract under which the money was paid, and that being done by the application for shares and the letter of allotment, they required an agreement stamp within the meaning of the 55 Geo. 3, c. 184. It comes within the definition of the statute: "an agreement or any minute or memorandum of an agreement, &c., whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument." They cited *Robinson* v. *Drybrough* (*b*).

Martin (with whom was *Hoggins*), in support of the rule.—The application for shares and the letter of allotment do not constitute the contract under which the money was paid. The application for shares proposes certain terms, and the letter of allotment imposes others, therefore the plaintiff's proposal has never been accepted; but the contract arises out of the letter of allotment, which must be considered as an original proposal by the defendant, which is accepted by the plaintiff by the payment of the deposit. As a written proposal accepted by an act done does not require a stamp, none was necessary in this case: *Penniford* v. *Hamilton* (*c*). [*Alderson*, B.—It appears to me that there is no agreement if the two letters are taken alone.] That is so. In *Edgar* v. *Blick* (*d*) Lord *Ellenborough* says, "This was a parol contract, adopting the terms of a written proposition previously existing." The proposition is merely evidence of the terms of the agreement subsequently made: *Vaughton* v. *Brine* (*e*). They also cited *Walstab* v. *Spottiswoode* (*f*) and *Wontner* v. *Shairp* (*g*).

(*a*) Before *Pollock*, C. B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

(*b*) 6 T. R. 317.

(*c*) 2 Stark. R. 475.

(*d*) 1 Stark. R. 464.

(*e*) 1 M. & Gr. 359.

(*f*) Ante, Vol. 4, p. 321; S. C., 15 M. & W. 501.

(*g*) Ante, Vol. 4, p. 342.

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POLLOCK, C. B.—It appears to us quite clear that no stamp was necessary in this case.

Rule absolute to enter the verdict for the plaintiff.

COURT OF EXCHEQUER.

Easter Term, 1847.

April 16. THE MIDLAND GREAT WESTERN RAILWAY COMPANY *v.* GORDON.

The defendant subscribed to an undertaking for a railway from D. to M. and A., with a branch to L., and signed the subscribers' agreement, by which it was declared, that the directors should have power to complete the railway and branch, or any part, and all such other works as therein mentioned, and for that purpose to select and fix upon, and from time to time to alter and vary, the sites or spots at or over which the said intended railway or branch thereof respectively should commence, extend, or terminate, and also the intermediate course or courses thereof. That the directors should make such application to Parliament for carrying into operation all or any of the purposes aforesaid, or any portion thereof, as the directors should think proper.

The directors applied to Parliament, and obtained an act, for a railway from D. to M. and L., which, amongst other things, empowered the company to purchase a canal, and bound them to maintain it for the purpose of navigation:—*Held*, that the directors were authorised in applying for and accepting such an act.

That the scheme subscribed for, and that for which the act was obtained, were identical.

The Companies Clauses' Consolidation Act, which was incorporated with the Company's, enacts (sect. 8), that every person who shall have subscribed to the capital of the company, and whose name shall be entered on the register shall be deemed a shareholder; (sect. 9), that the company shall keep a book in which shall be entered the names of those entitled to shares; (sect. 14), that every shareholder may transfer his shares by deed; (sect. 15), that such deed shall be delivered to the secretary, and that, until such transfer shall be so delivered, the vendor of the share shall continue liable to the company for any call that may be made upon such share. The defendant subscribed for shares in the undertaking, and was, without his consent, inserted on the register; he received scrip, and subsequently sold them:—*Held*, that he continued liable for calls so long as his name remained on the register.

Semble, the effect of a sale of scrip is to transfer an equitable title to the purchaser, to have the shares assigned to him and his name entered on the register as a shareholder.

DECLARATION in debt, for calls against the defendant as a shareholder of the Midland Great Western Railway Company, framed under sect. 26 of the 8th & 9th Vict. c. 16. Pleas, first, never indebted; secondly, that the defendant was not nor is he a shareholder.

The cause was tried before *Rolfe*, B., at the last Spring Assizes for Liverpool, when it appeared that in the autumn

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of 1844 the promoters of the scheme issued prospectuses for the formation of a company to construct a railway from Dublin to Mullingar and Athlone, with a branch to Longford. The defendant subscribed for ten shares, and, on the 21st of October, 1844, executed the subscribers' agreement, and received his scrip certificates, which were in the usual form. On the 28th of October, he *bonâ fide* sold them in the market. The subscribers' agreement was an indenture, made the 10th of October, 1844, between J. E., J. M., and J. B., of the first part, and the several persons whose names were thereunto subscribed and seals affixed, being the subscribers, of the second part. After reciting that a company had lately been formed and established for making a railway, called the Great Western Railway, from Dublin to Mullingar and Athlone, with a branch to Longford, the capital of the Company to be £1,000,000, to be raised in 20,000 shares of £50 each, and that the parties of the first part had been appointed by the Company to receive deposits and payments on account of the said shares, and that the parties of the second part had agreed to subscribe the sums set opposite to their names respectively in a schedule to the deed, towards carrying into effect the proposed undertaking. It was witnessed, that all the parties thereto, but only to the amount of money set opposite to their respective names in the schedule, covenanted, first, to subscribe the sums set opposite their names, &c., for the purpose of constructing, making, establishing, and maintaining a railway for the conveyance of goods and passengers, to be called the Great Western Railway from Dublin to Mullingar and Athlone, with a branch railway from the same from or near the town of Mullingar to Longford; and which railway from Dublin to Athlone was intended to commence either by a junction with the Great Southern and Western Railway, commonly known as the Dublin and Cashel Railway,

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&c., or at a suitable terminus from such part of the city of Dublin as might thereafter be agreed upon, and to terminate at or near the town of Athlone, in the county of Westmeath, together with such roads, stations, &c., as the directors for the time being engaged in the promotion and conduct of such undertaking might think expedient and proper; secondly, that the persons who for the time being might be directors should have full power and authority to make and complete the said railway, and said branch thereof respectively, or any part or parts thereof respectively, and all such other works as aforesaid, and for that purpose to select and fix upon, and from time to time to alter and vary the sites or spots at or over which the said intended railway and branch thereof respectively, should commence, extend, or terminate; and also the intermediate course or courses thereof respectively, and the parishes, townships, townlands, and places in, through, and along which, the same should be carried, and also to fix upon, and from time to time to alter and vary, the plan, extent, and situation of the several works connected with such railway and said branch thereof respectively; thirdly, that the said directors should make and cause to be made such application or applications to Parliament, in the then next or any future session thereof, for one or more acts of Parliament for the better and more effectually carrying into operation all or any of the purposes aforesaid, or any portion thereof, as the said directors in their discretion should think proper; fourthly, that the parties would pay the sums set opposite their respective names in the schedule, at such places and times and in such manner as should be required by the directors for the time being, until the passing of the said act or acts, and afterwards as should be required by such act or acts, or by the directors or other persons acting in the execution thereof: provided also, that those presents, and everything therein contained, should be deemed and taken to be in all things

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subject to the several provisions, regulations, and enactments in the said act or acts to be contained.

In the session of 1845 the directors applied for and obtained an act of Parliament (8 & 9 Vict. c. cxix.), intituled "An Act for making a Railway from Dublin to Mullingar and Longford, to be called The Midland Great Western Railway Company of Ireland." That statute, after directing that the Companies Clauses' Consolidation Act (8 & 9 Vict. c. 16), The Lands Clauses' Consolidation Act (8 & 9 Vict. c. 18), and The Railway Clauses' Consolidation Act (8 & 9 Vict. c. 20), shall form part of the act, by sect. 3 incorporates the Company. The 31st and subsequent sections empower the plaintiffs to agree with a canal company for the purchase of a canal (the Royal Canal), and the warehouses, buildings, &c. of the company, and binds the plaintiffs to maintain, uphold, and preserve the same for the purposes of navigation (*a*).

(*a*) The following sections of the Companies Clauses' Consolidation Act, 8 & 9 Vict. c. 16, enact,—

Sect. 3. That the word "shareholder" shall mean shareholder, proprietor, or member of the Company.

Sect. 6. That the capital of the company shall be divided into shares of the prescribed number and amount, &c.

Sect. 8. That every person who shall have subscribed the prescribed sum or upwards to the capital of the Company, or shall otherwise have become entitled to a share in the Company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the Company.

Sect. 9. That the Company shall keep a book, to be called the "register of shareholders," and in such book shall be fairly and distinctly entered from time to time the names of the several corporations, and the names and additions of the several persons entitled to shares in the Company, &c.

Sect. 14. Subject to the regulations herein, or in the special act contained, every shareholder may sell and transfer all or any of his shares in the undertaking, or all or any part of his interest in the capital stock of the Company, in case such shares shall, under the provisions hereinafter contained, be consolidated into capital stock; and every such transfer shall be by deed, duly stamped, in which the consideration shall be truly stated; and such deed may be according to

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The directors having formed a register of shareholders, without communicating with the defendant, caused his

the form in the schedule to this act annexed, or to the like effect.

Sect. 15. That the said deed of transfer (when duly executed) shall be delivered to the secretary, and be kept by him, and the secretary shall enter a memorial thereof in a book to be called the "register of transfers," &c.; "*and until such transfer has been so delivered to the secretary as aforesaid, the vendor of the share shall continue liable to the Company for any calls that may be made upon such share*, and the purchaser of the share shall not be entitled to receive any share of the profits of the undertaking, or to vote in respect of such share."

Sect. 25 empowers the Company to sue such shareholder for calls.

Sect. 27. That "on the trial or hearing of such action or suit it shall be sufficient to prove that the defendant, at the time of making such call, was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given, as is directed by this or the special act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever; and thereupon the Company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear, either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period.

Sect. 28. The production of the register of shareholders shall be *primâ facie* evidence of such defendant being a shareholder, and of the number and amount of his shares.

Sect. 21. That with respect to the payment of subscriptions and the means of enforcing the payment of calls, the several persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the Company, at such times and places as shall be appointed by the Company; and with respect to the provisions herein, or in the special act contained, for enforcing the payment of calls, the word "shareholder" shall extend to and include the legal personal representatives of such shareholder.

Sect. 22. That it shall be lawful for the Company from time to time to make such calls upon the respective shareholders, in respect of the amount of capital respectively subscribed or owing by them, as they shall think fit, &c.,

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name to be inserted thereon, and on the 31st of July the 11th of December, 1845, and the 3rd of July, 1846, made the calls in question, which not being paid, the present action was brought, against the defendant.

At the trial it was contended on behalf of the defendant, first, that he was not a shareholder, and not liable to pay the calls; and, secondly, that he had never subscribed to the undertaking for which the act had been obtained. The learned Judge directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit.

Martin now moved,—First, the defendant was not a shareholder at the time of the calls; he had ceased to be so by the sale of the shares, and the vendee was then the shareholder and liable for them. Section 22 of the 8 & 9 Vict. c. 16, empowers the Company to make calls on *shareholders*, and the 21st provides that *subscribers* must pay the money subscribed; and the effect of the transfer is to substitute the vendee for the original subscriber, and to render him the shareholder within the 22nd section. The Company contemplated that the shares would be transferred, as they are negotiable; *The London Grand Junction Railway Company* v. *Freeman* (*a*). *Denman*, C. J., there says, "There is no principle of law preventing the Company, when they came to make up the register book, from treating the then holders of scrip certificates applying for shares, as the parties really contributing towards the £600,000 which the Company were by section 3 authorised to raise. It was the manifest intention of the original subscriber that the holder of his scrip certificate should be treated as his assignee, and be registered accordingly as a shareholder, and we see nothing

and every shareholder shall be liable to pay the amount of the calls so made, in respect of the shares held by him, to the persons, and at the times and places, from time to time appointed by the Company.

(*a*) Ante, Vol. 2, p. 468; S. C., 2 Man. & Gr. 606; 2 Scott, N. R. 705.

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in the provisions of the act, or in any general principles of law, to prevent this intention from being carried into effect." [*Parke*, B.—The sale of the scrip gives the purchaser an equitable right to have his name placed on the register; and if he gets it on the register he becomes a shareholder, and the original subscriber's liability ceases, but not until then. The case of the *London Grand Junction Company* v. *Freeman* is not inconsistent with this.] Secondly, the defendant has never subscribed to the undertaking for which the act has been obtained. He subscribed to an undertaking for a railway from Dublin to Mullingar *and Athlone*, with a branch to Longford, and not for one from Dublin to Mullingar and Longford alone; consequently there is no act for carrying into effect the scheme subscribed to, by the defendant. The defendant has never subscribed to a scheme for a railway stopping short at Mullingar; he subscribed on the faith that it would be carried to Athlone. [*Rolfe*, B.—If there be a deviation from the intended course of a railway, by carrying it on one side of a field instead of another, would the subscriber be exonerated from the calls?] No; because that would be the same scheme, but this is a different one. [*Parke*, B.—The subscribers ought to have watched their own interests, and might have gone to Parliament and have represented that the directors were applying for something contrary to their intention.] The subscribers would not be heard in Parliament, having transferred all their powers to the directors. But there is another equally fatal objection to the plaintiffs' claim. Their act empowers them to purchase a canal, and they are compelled to keep it in repair for the purpose of navigation, which is no part of the scheme subscribed to by the defendant, but is a substantial variation from it. [*Pollock*, C. B.—Where the directors of a scheme make a *bonâ fide* application to Parliament for the purposes contemplated by the subscribers, and the Legislature grants them the necessary powers, but

on certain conditions, as that they shall keep in repair a canal or turnpike road, all the parties must be taken as assenting to those terms.] But it is submitted that the purposes contemplated were not those for which the act was obtained.

POLLOCK, C. B.—As to the argument, that the defendant has not subscribed to the undertaking in respect of which these calls were made, the answer is, that an undertaking of this nature, entered into by directors and subscribers, is Protean in its character, and shifts with the provisions of the act of Parliament which sanctions it. But in the present case the subscribers gave the directors the fullest powers of applying to Parliament, and agreed to be bound by whatever Parliament might do on that application. On the second point the defendant, and not his vendee, is, I think, the party liable for these calls; therefore there will be no rule.

PARKE, B.—As to the first point, all we decide is, that the persons who subscribed to this undertaking are bound by the act which the directors have obtained, as they have clearly acted within the scope of their authority. If they had obtained an act for making a totally different railway from that subscribed for, whether in that case the subscribers would be bound is another matter, although I incline to think that they would; but when we look at the powers given to the directors by the subscribers' agreement, that question does not arise. Those powers are very extensive. The directors are authorised "to make and complete the said railway and said branch thereof respectively, or any part or parts thereof respectively, and all such other works as aforesaid; and for that purpose to select and fix upon, and from time to time to alter and vary the sites or spots at or over which the said intended railway and branch thereof respectively should commence,

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extend, or terminate, and also the intermediate course or courses thereof respectively, and the parishes, townships, townlands, and places in, through, and along which the same should be carried; and also to fix upon, and from time to time to alter and vary the plan, extent, and situation of the several works connected with such railway and said branch thereof respectively;" and to apply to Parliament for an act for the "more effectually carrying into operation all or any of the purposes aforesaid, or any portion thereof, as the said directors in their discretion shall think proper." And also, that the deed itself, "and everything contained therein, should be deemed and taken to be in all things subject to the several provisions, regulations, and enactments in the said act or acts to be contained." A general power is thus given to the directors to apply to Parliament; and if so, the subscribers must take what Parliament will give. Besides, how can we say that the power to purchase the canal may not be valuable and important for the purposes of the railway? But this is, in truth, the same scheme as that subscribed for. As to the second point, the words of the statute are express. The 21st section of the 8 & 9 Vict. c. 16, renders all persons who have subscribed money to an undertaking liable to pay the same or any portion thereof when called for, &c. Then the 8th section says, that every person who shall have subscribed to the undertaking, and whose names shall be entered on the register of shareholders, shall be deemed a shareholder of the company; and the 14th and 15th sections provide that every transfer of shares shall be by deed, and until such deed shall be delivered to the secretary, the vendor shall continue liable for the calls. Here the defendant has subscribed towards this undertaking, and his name is entered on the register. If he had transferred these shares by deed, and had complied with the statute, he would no longer have been liable for calls; but the transfer of scrip will not exonerate him; the only effect of such a transfer is to give

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the transferee an equitable title to have the shares assigned to him, and his name entered on the register as a shareholder. That being done, the transferee would be a shareholder, and the original subscribers' liability would cease; but until the entry on the register is effected, the shares are not transferred. This is quite consistent with the *London Grand Junction Railway Company* v. *Freeman*; the Court there says, in substance, that, where there has been a transfer of an equitable bargain, and the transferee comes in and registers, he thereby becomes a shareholder.

ROLFE, B., and PLATT, B., concurred.

Rule refused.

COURT OF QUEEN'S BENCH.

Trinity Term, 1847.

POTT and Another *v.* FLATHER.

June 9.

The defendant purchased scrip railway shares of the plaintiff at 25*s.* premium on the 20th of October; but the scrip were not issued until the 24th. On the 21st of that month the shares fell to 14*s.* premium. At six in the evening of that day, the defendant gave notice to the plaintiffs that he should not take the shares. On the 22nd the shares had fallen to 8*s.* premium, and continued to fall until the 6th of December, when the plaintiffs, after notice to the defendant, sold them at 17*s.* discount. In an action for not accepting or paying for the shares,—*Held*, that the measure of damages was the difference in the price of the shares between the 20th and 22nd of October.

ASSUMPSIT.—The first count of the declaration stated that the defendant agreed to buy, and the plaintiffs agreed to sell to the defendant, divers, to wit, twenty shares in a certain public joint-stock company, called the Nottingham and Gainsborough Railway Company, then being formed for the purpose of making a certain intended railway, to wit, certain scrip shares, deliverable by the delivery of certain certificates, called scrip certificates, evidencing the right of, and entitling the holders of the same respectively to, such number of shares of and in the said undertaking

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as in such certificates respectively mentioned, at and for a certain price, to wit, the sum of 3*l.* 7*s.* for each of the said twenty shares so agreed to be sold as aforesaid, the said shares to be delivered by the plaintiffs to the defendant within a reasonable time then next following, and to be paid for as aforesaid on delivery thereof. The declaration then averred mutual promises, and that within a reasonable time then next following, to wit, on &c., they, the plaintiffs, offered, and were then ready and willing to deliver the said twenty shares to the defendants, to wit, to deliver to him such scrip certificates as aforesaid of and for twenty shares of and in the said undertaking. Breach: that the defendant did not, when he was so requested as aforesaid, or at any time, accept or pay for the said shares, &c. The declaration also contained a count for scrip certificates bargained and sold, and a count on an account stated.

Plea to the whole declaration: payment into court of £11, and that the plaintiffs had not sustained damages ultra.

Replication: damages ultra, £11.

It appeared on the trial, before *Coleridge*, J., at the Summer Assizes, 1846, for Nottingham, that, on the 20th of October, 1845, the defendant purchased of the plaintiffs, share-brokers, twenty shares in the then projected Nottingham and Gainsborough Railway Company, and the following sold note was signed by the plaintiff, Pott:—

"Mart, High-street, Nottingham.

"Sold to Mr. James Flather, on account of ——, twenty shares in the Nottingham and Gainsborough, at 25*s.* per share premium. By

"POTT & LOVICK."

A corresponding bought note was signed by the defendant, and a deposit of 2*l.* 2*s.* per share had been paid at the time of the purchase. The purchase-money was therefore £67, namely, the deposit £42, and the premium £25. The letters of allotment were made out on the 20th, but the scrip was not issued until the 23rd; that day being Sunday

the plaintiffs could not deliver the shares until the 24th. On the 21st of October, the day after the purchase, the plaintiffs' clerk informed the defendant that the scrip would be ready for delivery in a day or two; but at six in the evening of the same day the defendant told the plaintiffs' clerk that he should not accept the shares. The lowest price of the shares on the 21st was 14*s.* premium; but on the 22nd and 23rd the price was 8*s.* premium, and from that time they continued to fall in price. On the 24th of October the scrip was tendered to the defendant, who refused to accept it. On the 6th of December the plaintiffs wrote to the defendant, giving him notice that they should sell out as against him at the prices of that day, and should hold him answerable for the difference. Accordingly, on that day they sold the shares at 17*s.* discount,—the loss upon that re-sale amounting to £42; and to recover that amount the plaintiffs brought this action. The £11 paid into court by the defendant was on a calculation of the loss on the shares on a sale at 14*s.* premium—the price on the 21st of October.

It was contended on behalf of the defendant, on the authority of *Boorman* v. *Nash* (*a*), that the measure of damages was the difference between the price at the time the contract was made and that when it was broken. The jury, under his Lordship's directions, found a verdict for the plaintiffs for £31, leave being reserved to the defendant to move to enter a nonsuit.

In the following Michaelmas Term, a rule nisi having been obtained accordingly,

Whitehurst and *Miller* now shewed cause, and cited the following cases, contending that the property in the shares had passed to the defendant, and that he could not repudiate his contract: *Tarling* v. *Baxter* (*b*), *Rugg* v. *Minnett* (*c*); that the measure of damages was correct: *Shepherd* v.

(*a*) 9 B. & C. 145. (*b*) 6 B. & C. 360. (*c*) 11 East, 210.

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Johnson (*a*), *Green* v. *Bicknell* (*b*), *Startup* v. *Cortazzi* (*c*), distinguishing *Boorman* v. *Nash* (*d*). [*Patteson*, J.—In actions for not delivering goods, although the plaintiff is not bound to purchase other goods, yet the measure of damages is the difference between the price at the time of the contract and the time of the actual delivery; but in this case you cannot contend you were at liberty to wait for an indefinite period before you sold. Suppose the shares had risen in value, and there had eventually been a profit upon them; according to your argument the defendant would have sued the plaintiff for the difference.]

Martin and *Barlow*, contrà, upon the question whether the property ever passed to the defendant, cited *Atkinson* v. *Bell* (*e*), *Dixon* v. *Yates* (*f*), and contended that the damages the plaintiffs were entitled to recover was the difference between the contract price and that at which the shares might have been sold within a reasonable time after the defendant's refusal to accept them, and cited *Boorman* v. *Nash* (*g*), *Green* v. *Bicknell* (*h*), *Stewart* v. *Cauty* (*i*), *Shaw* v. *Holland* (*k*).

DENMAN, C. J.—The law in this case is perfectly clear. The only question is as to its application to these facts. We are all of opinion that the damages ought to be reduced to £6,—the price on the 22nd, calculated upon a sale at 8*s*. premium.

PATTESON, COLERIDGE, and ERLE, J.'s, concurred.

Rule absolute, to reduce the damages to £6.

(*a*) 2 East, 211.
(*b*) 8 Adol. & Ell. 701.
(*c*) 2 C., M. & R. 165.
(*d*) 9 B. & C. 145.
(*e*) 8 Id. 277.
(*f*) 5 B. & Ad. 313.
(*g*) 9 B. & C. 145.
(*h*) 8 Adol. & Ell. 701.
(*i*) Ante, Vol. 2, p. 616; S. C. 8 M. & W. 160.
(*k*) Ante, Vol. 4, p. 150; S. C. 15 M. & W. 136.

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COURT OF COMMON PLEAS.

Hilary Term, 1848.

PILBROW *v.* PILBROW'S ATMOSPHERIC RAILWAY AND CANAL PROPULSION COMPANY. *Jan.* 21, 22.

THE declaration stated, that, by a certain deed between the plaintiff and the said Company, therein described as registered and incorporated in pursuance of the 7 & 8 Vict. c. 110, intituled &c., which said deed was then sealed with the seal of the said Company, and was then signed by three of the directors of the said Company &c., reciting that her Majesty, by letters patent, bearing date the 17th day of May, 1844, granted unto the plaintiff, his executors, administrators, and assigns, the sole and exclu-

The 2nd count of the declaration stated, that, by a certain deed between the plaintiff and the defendants, therein described as registered and incorporated in pursuance of the 7 & 8 Vict. c. 110, reciting the granting of certain letters

patent to the plaintiff, and that the said Company (the defendants) had been duly formed under a deed of settlement for the working of the said patents, and that the said Company had been registered and incorporated under the provisions of the said act; and further reciting an agreement for the sale of the patent. It was witnessed and covenanted that the plaintiff would join in an application for an act, and would convey the patents to the company, and that the sum of £15,000 in cash should be paid to the plaintiff as soon as conveniently could be done, after the execution of the said articles, out of the money raised by the first instalments or calls on the shares in the said Company. Breach, that, although the Company, within a convenient time after the execution of the said articles, could and might, by calls and instalments on the shares, have raised the said sum, and a convenient and reasonable time for raising the said money and paying the same in cash to the plaintiff had elapsed, and although the Company had paid to the plaintiff £1000, yet that they had not paid the residue.

Pleas—3rdly, that the deed of settlement was obtained by fraud. 4thly, that the registry and incorporation were obtained by fraud. 8thly, that the Company was formed under a deed of settlement, to which the plaintiff was a party, by which it was, amongst other things, agreed that the directors should pay to the plaintiff out of the first calls, after providing thereout a sufficiency to meet the necessary expenses of the Company, £15,000. That no calls had been received sufficient to satisfy the necessary expenses and the said £15,000, or any part thereof. 21st, that the said Company was not incorporated by charter or act of Parliament, nor was the same *duly and lawfully* registered and incorporated. 22ndly, that the Company required a certificate of complete registration; that, at the time of obtaining such certificate, the Company was not formed by deed or writing under the hands and seals of the shareholders:—*Held*, that the 3rd, 4th, 8th, and 22nd pleas were bad.

That the 21st plea was also bad; for if it meant a denial of the registration in fact, the defendants were estopped by their deed, and if a denial in fact was not meant, then that the plea was bad for putting in issue, matter of law.

Held, lastly, that the declaration was good on general demurrer, and that the breach was well assigned.

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sive license of making, using, and vending for the term of fourteen years, an invention in "certain" improvements in the machinery for, or a new method of, propelling carriages on "railways and common roads, and vessels on rivers and canals," within England and Wales and Berwick-upon-Tweed; and that a specification was duly inrolled in Chancery on &c.; and that the said Company had been duly formed under a deed of settlement, bearing date the 22nd day of May then last past, for the working of the said several patents for the United Kingdom, and that the said Company had been registered and incorporated under the provisions of the said act, and that the capital of the same consisted of £600,000 divided in 60,000 shares of £10 each*; and that it had been agreed that the plaintiff should grant to the said Company a license for the exclusive use of the patent during the remainder of the said term; and that, in consideration of such grant, the sum of £15,000 in cash should be paid to the plaintiff so soon as conveniently could be after the execution of these presents out of the money raised by the first instalments or calls on the shares of the said Company. Then followed a covenant to pay the £15,000. Breach, non-payment.

The second count was a repetition of the first as far as the asterisk, and then proceeded: And further reciting that the plaintiff had offered to sell to the said Company the said several patents for the United Kingdom, and the benefit and advantage of the same respectively for the price of £15,000 in cash, and 4500 shares in the said Company, upon each of which shares the full sum of £10 was to be considered as paid up, and the said Company were willing to purchase such patents upon the terms aforesaid so soon as the same could by law be effected, and an act of Parliament should have been obtained authorising the said purchase by the Company, and that, in the meantime, and until such act of Parliament could be obtained, it had been proposed that the plaintiff should grant to the said Company a

license for the exclusive use of the said several patents during the remainder of the term of years, which had been done. It was witnessed, that, for effectuating the said desire, it was thereby agreed, and the plaintiff did, for himself &c., thereby covenant with the said Company and their successors; and the said Company did, for themselves and their successors, covenant with the plaintiff, that, whensoever the said Company or their successors should apply for an act of Parliament to enable them to purchase and take a conveyance of the said several letters patent, then the plaintiff would, upon the request of the said Company, join and concur in the said application, and sign the petition for the said intended act, and do all such other acts for facilitating the said Company therein and procuring the said intended act to be passed, and would, immediately after the act should be passed, convey and assure the said several patents unto the said Company and their successors, or, at the option of the said Company, the said patents might, without any further consent of the plaintiff, his executors and administrators, be vested by the said act in the said Company for their absolute use and benefit, and that the sum of £15,000 in cash should be paid to the plaintiff as soon as conveniently could be done after the execution of the said articles out of the money raised by the first instalments or calls on the shares in the said Company. And the plaintiff says, that, although he hath at all times performed and fulfilled all things therein contained, and although the said Company, within a convenient and reasonable time after the execution of the said articles of agreement, could and might, by calls and instalments on the shares of the said Company, have raised the said sum of £15,000, and a convenient and reasonable time for raising the said money and paying the same in cash to the plaintiff from and after the execution of the said articles of agreement had elapsed long before the commencement of this suit; and although the said Company have, in part performance of their said last-mentioned covenant, paid to the plaintiff a part of the said

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sum of £15,000 (to wit) £1000, yet the said Company have not paid the said residue of the said last-mentioned sum of £15,000, or any part thereof, but have hitherto wholly refused and still do refuse to pay the same, or any part thereof.

Third plea to the first count. That the said deed of settlement in that count mentioned and referred to was obtained by the fraud, covin, and misrepresentation of the plaintiff and others in collusion with him. Verification.

Fourth plea to the first count. That the registry and incorporation of the said Company, recited in the said deed in that count mentioned, were obtained by the fraud, covin, and misrepresentation of the plaintiff and others in collusion with him. Verification.

Eighth plea to the first count. That the said Company was formed by and under a certain deed of settlement in the said first count mentioned between the several persons whose names are thereunto subscribed, (and one of which is the said plaintiff), of the first part; the Earl of Essex &c., of the second part; and Francis John Lambert, of the third part: profert; and that thereby each of them, the said parties whose names and seals were thereunto respectively set and affixed (save only the parties thereto of the second part), did, for himself and herself, covenant, declare, and agree with and to the said parties thereto of the second part as trustees on behalf of the said Company, that a capital of £600,000 be raised by the issue of 60,000 shares of £10 each; that the directors might proceed and carry on the business of the said Company, although all the said 60,000 shares had not been subscribed for; that, to carry on the business of the Company, it should be lawful for the directors from time to time, as they might deem expedient, to make such call or calls on the shareholders for the payment of such instalments on their shares beyond any call or calls then already paid as the directors should from time to time think necessary, until the whole thereof should be paid, and which instalment or instalments each and every

of the parties thereto would duly pay accordingly: Provided nevertheless no more than £1 per share should be called for at any one time, and that, after any call should have been made, twenty-one days, at least, should elapse before any further calls should be made; that the directors should, as soon as conveniently could be after the complete registration of the said Company, cause to be satisfied out of the funds of the said Company all the costs, charges, and demands upon the said Company for business already done on account of the said Company, and which, on the day of the date of the said deed of settlement should remain unsatisfied, including the costs and charges incidental to the formation of the said Company, and the costs and expenses of and relating to the preparing and executing the said deed; and should also pay, or cause to be paid, to the plaintiff with and out of the monies received from the first calls on the shares of the said Company, after providing thereout a sufficiency to meet the necessary expenses of the said Company, the said sum of £15,000 in cash. And the defendants say, that, from the time of the execution of the said deed of settlement hitherto, no calls or instalments on the shares of the said Company have been raised or paid to, or received by, the said Company, or by any persons on their account, sufficient to satisfy the necessary expenses of the said Company, according to the true intent and meaning of the said deed, and the said sum of £15,000, or any part thereof. Verification.

Eighteenth plea, to the second count; the same as the eighth plea.

Twenty-first plea, to the declaration. That the said Company was not incorporated by any charter or act of Parliament, nor was the same duly and lawfully registered and incorporated according to the form of the statute in such case made and provided, and in the said deed and articles of agreement respectively mentioned, at the respective times of the making of the said deed and articles of agreement in the declaration mentioned, or either of them. Verification.

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Twenty-second plea. That the said Company was a company requiring a certificate of complete registration within the true intent and meaning of the said act of Parliament in the declaration firstly above mentioned; and that at the time of the obtaining a certificate of complete registration by the said Company, the said Company was not formed by a deed or writing under the hands and seals of the shareholders therein, or any of them, in pursuance of the provisions of the statute in such case made and provided, and in the said declaration firstly above mentioned; nor was there at any time any such deed of settlement of the said Company as is required by the statute. Verification.

Replication: to the third and fourth pleas, general demurrer.

To the eighth plea, de injuriâ.

To the eighteenth plea, special demurrer.

For that the second plea endeavours to raise an immaterial issue, inasmuch as it is wholly immaterial whether the said Company could or could not have raised sufficient funds for the purposes therein mentioned after the execution of the deed of settlement; and for that the said plea does not in any respect confess or avoid the plaintiff's cause of action as set forth in the second count of the declaration; and for that the covenant on which the plaintiff founds his action on the said second count, cannot be controlled or affected by any covenant in a deed previously executed, and not incorporated therewith. And for that the said plea contains no denial that calls and instalments might not have been made previously to the execution of the deed of settlement, out of which the said sum of £15,000, or some part thereof, might have been paid to the plaintiff. And for that the matters alleged in the said eighteenth plea are wholly irrelevant and immaterial.

To the twenty-first plea, special demurrer. For that the said Company is estopped by pleading in this action in the corporate name, and by the execution of the said deed and articles of agreement in the first and second counts of

the declaration respectively mentioned and set forth, from denying or disputing that the said Company was duly registered and incorporated. And for that the said plea wants particularity, inasmuch as it ought to have shewn how and in what respect the supposed incorporation and registration were defective, or not in accordance with the statute. And for that the said plea tenders an issue of law.

To the twenty-second plea, special demurrer. For that the said Company are estopped as well by pleading to this action in the corporate name, as by the execution of the said deed and articles of agreement in the first and second counts of the declaration respectively mentioned, from disputing or denying that the said Company had been and was duly registered and incorporated according to the provisions of the statute in that behalf; and that the said Company, by denying the sufficiency and validity of such registration and incorporation, is attempting to take advantage of its own wrong. And for that the said plea wants particularity, inasmuch as it ought to have shewn how and in what respect the deed of settlement was not in conformity with the provisions of the said statute. And for that the said plea attempts to raise an issue on matters of law.

Joinder in demurrer.

To the replication to the eighth plea, special demurrer.

The plaintiff's points were: to the third and fourth pleas, that it is not competent to the Company, after appearing and pleading as an incorporated Company, to deny the validity of its own incorporation. Also, that it appears by the declaration that the Company has, in a deed sealed with its common seal, described itself as a Company registered and incorporated in pursuance of the act of Parliament in that behalf, and is therefore estopped from disputing the validity of the incorporation. Also, that such a defence cannot be made available by pleading.

To the twenty-first plea, besides those particularly pointed out by the special demurrer, that by this plea the defendants are endeavouring to take advantage of their own wrong.

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The plaintiff will object to the sufficiency of the twenty-second plea, on grounds similar to those which apply to the twenty-first.

The defendants' points were—To the third plea, that it is competent to the defendants, as against the plaintiff, to set up his fraud in bar of an action brought by him on a claim founded on such fraud. That the Company, although it exists in fact as a company, is entitled to set up the fraud of the plaintiff in the formation of it. That there would be no other way in which the Company could avail itself of the defence of the plaintiff's fraud. That the first count shews on the face of it, that the deed on which the plaintiff has declared, was executed on account of, and in consequence of, the deed of settlement, and, therefore, that the same fraud affects both deeds equally. That, however the defendants may be estopped from denying the existence in fact of the deed of settlement, they are not estopped from denying the validity of such deed.

On the demurrer to the fourth plea, the defendants will raise the same points as those above stated with respect to the third plea.

On the demurrer to the replication to the eighth plea, the defendants will raise the points specially stated in the body of the demurrer.

On the demurrer to the eighteenth plea, the defendants will contend that it sufficiently appears by the second count of the declaration, and by that plea, that the calls out of which the plaintiff was to be paid, were calls to be made after the execution of the said articles of agreement, and that the plea shews how it was, the Company had not been able to pay the whole of the £15,000 on calls so made, and is, therefore, an answer to the count.

The defendants will also contend that the breach stated in the second count is bad: that it appears on the second count, that the time of making the calls was at the discretion of the Company. That the covenant is not to make calls within any specific time, but whenever they are made,

to pay the £15,000 out of monies raised by such calls. And that the breach should have stated, that the calls had in fact been made, and not that they might have been made.

On the demurrers to the twenty-first and twenty-second pleas, the defendants will contend that they are not estopped from shewing that the provisions of the Registration Act had been neglected in respect of the formation of the Company.

F. Robinson (with whom was *Talfourd*, Serjt.), in support of the demurrers to the pleas.—The third plea is clearly bad; it does not set up fraud in obtaining the deed sued upon, but in the obtaining of the deed of settlement of the Company. Suppose that plaintiffs, being partners, were to sue on a bill of exchange, could it be said, that, because the partnership had been obtained by fraud, the plaintiffs could not sue? But it is not said in what the fraud consists, and on that account it is bad. [*Maule*, J.—The plea says that the deed was obtained by fraud, not that its execution was so obtained; it might have been fraudulently got from a clerk or person having the proper custody of it, or from a carrier; that would be an obtaining by fraud.] The fourth plea is also bad, for the reasons that the third is.

Bovill (with whom was *Peacock*), in support of the third and fourth pleas.—The question on these pleas is, whether the projector of a company can fraudulently procure the registration of a company, and a deed of settlement, for his own purposes. The deed is the instrument by which the funds are to be raised, and if that deed be invalid there is no power to raise funds. [*Wilde*, C. J.—It is admitted on these pleas that the funds have been raised.] That makes no difference, because they are to be applied, in the first instance, towards paying the expenses. [*Maule*, J.—The plea is, that the deed, having been executed, was obtained by fraud; that may mean that it was wrongfully

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obtained from a carrier, or an attorney claiming a lien.] It means, on general demurrer, that the execution of it was obtained by fraud; at any rate, this is the usual way of pleading fraud. [*Maule*, J.—That is, where the deed sued on, is alleged to have been obtained by fraud.] The fourth plea is good: unless there be a valid registration, there are no means of raising funds; and if a party obtains the complete registration of a company by fraud, he cannot afterwards obtain contracts from such company, illegally constituted, and then sue its members on them. [*Cresswell*, J.—On whom was the fraud?—who makes the entry? *Wilde*, C. J.—You are the parties who make the registration, and enter into contracts, and then say that your incorporation was obtained by fraud; you are sued and appear as a corporation; how can you afterwards say you are no corporation? *Maule*, J.—If the execution of a deed is obtained by fraud, the parties defrauded may elect to treat it as void, but they may adopt it if they like.] The plaintiff was party to the deed, and having obtained its execution by fraud, we have a right to set up that defence.

PER CURIAM.—The third and fourth pleas are bad.

F. Robinson, in support of the demurrers to the eighth and eighteenth pleas.—Those pleas are bad; the deed of settlement is not to control the subsequent deeds, though between the same parties; a subsequent deed will control a prior: *Patmore* v. *Colburn* (*a*); but in truth it is a mere regulation or agreement between the shareholders, and does not affect the deeds of the Company. The pleas say, that from the time of the execution of the deed of settlement no calls have been made; but the directors may, consistently with these pleas, have had funds in hand at the time of its execution.

(*a*) 4 Tyr. 840; *S. C.*, 1 C., M. & R. 65; *Webb* v. *Plummer*, 2 B. & Ald. 746.

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Bovill, contrà.—The pleas are good. The plaintiff has entered into the deed of settlement, by which the parties have agreed that the plaintiff shall be paid out of a particular fund, and we shew that these funds have not yet been raised.

WILDE, C. J.—Is not the second deed a guarantee that the funds shall be raised? Then what objection is there to the parties modifying the deed of settlement by a subsequent deed? The pleas are both bad.

F. Robinson, in support of the demurrer to the 21st and 22nd pleas.—The 21st plea is bad. The plea ought to have been nul tiel corporation; for aught that appears, they may be a foreign corporation, and competent to sue: *The Dutch West India Company* v. *Van Moses* (*a*), *St. Charles* (*Bank*) v. *De Bernales* (*b*). The plea says, that the Company was not duly and lawfully incorporated. It ought to have shewn how not: *Hume* v. *Liversidge* (*c*), *Webb* v. *James* (*d*), *Ransford* v. *Copeland* (*e*). The 7th and 25th sections of the 7 & 8 Vict. c. 110, are directory only: *The Margate Pier Company* v. *Hannam* (*f*), *Cook* v. *Henson* (*g*). [*Wilde*, C. J.—In the Ships' Registry Act, the omission of the names of the officers would not affect the transfer of the ship.] But if this plea be a defence, the defendants are estopped from taking it; for it is recited in the deed that the defendants have been incorporated under the provisions of the act, which means duly: *Bowman* v. *Taylor* (*h*), *Hill* v. *The Manchester Waterworks* (*i*). The 22nd plea is also bad. The defendants are sued as a corporation, and appear in that character, and say that they are not a corporation; if they appear they must be a corporation, and if they are

(*a*) 1 Str. 612.
(*b*) R. & M. 190.
(*c*) 1 C. & Mee. 332.
(*d*) 7 M. & W. 279.
(*e*) 6 A. & E. 482.
(*f*) 3 B. & Ald. 266.
(*g*) 1 C. B. 908.
(*h*) 2 A. & E. 278.
(*i*) 2 B. & Ad. 544.

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not, they ought not to have appeared: Brooke's Abr., tit. Corporation, pl. 28; The Corporation of Lombards of London, Bro. Ab., Estoppel, 79.

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Bovill, contrà.—As to the 21st plea, the doctrine of estoppel does not apply; the statement in the deed and the averment in the plea are not identical, the deed stating a fact, that the Company "had been registered and incorporated," and the plea alleging that it was not duly and lawfully incorporated. It is said that the plea does not exclude the defendants being a foreign corporation, but the deed recites a particular corporation under the 7 & 8 Vict. It is said that the plea raises matter of law: *Abbot of Strata Marcella's case* (*a*). In cases of patents and annuities, a plea that no specification or memorial was duly enrolled is good: *Muntz* v. *Foster* (*b*). It is the same as if we had pleaded that the deed was not registered. In declarations on bills against the drawer it is correct to allege that he had due notice of non-payment by the acceptor. [*Williams*, J.—You say that the incorporation is insufficient, but do not say how, you ought to state facts from which the Court could judge whether it is sufficient or not.] The 22nd plea is good; it alleges that there is no deed of settlement under the statute; and if so, the consequence is that there is no corporation. [*Wilde*, C. J.—But you appear as a corporation, and say you are no corporation. *Maule*, J.—The deed alleges that the Company was incorporated, (that means duly), under the provisions of the act. If the plea is inconsistent with that allegation you cannot plead it.] Then the second count is bad on general demurrer: the covenant is that £15,000 shall be paid out of the money raised by the first instalments; it is not a covenant that the defendants will pay, and the breach is, that the Company have not paid. The fund being raised

(*a*) 9 Rep. 24. (*b*) 6 M. & G. 734.

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is a condition precedent. There is no allegation that it has been raised; and until raised, there can be no breach in not paying: *Pontet* v. *The Basingstoke Canal Company* (*a*). [*Maule*, J.—The covenant is not, provided any money shall be raised, but out of the money raised. This is like the case of a man saying, "I will pay you money out of my pocket," and then, as an excuse, alleging that he had no money in his pocket.] That is not quite the case; the plaintiff is to look to a particular fund for payment, and not to the Company; it clearly was intended that there should be no personal liability. This is the common course adopted in policies of insurance,—the insurers covenant to pay out of a particular fund; and in declaring, it is necessary to aver that there are funds: *Andrews* v. *Ellison* (*b*), *Quarrington* v. *Arthur* (*c*). [*Wilde*, C. J.—Is not the covenant to pay out of a fund already raised?] Such is clearly not the intention of the parties. There is no implied power of raising, and therefore no duty. [*Maule*, J.—There is a duty if a power; that is, to raise and pay.] But where parties bind themselves by express covenant there can be no implied one: *Gwillim* v. *Daniell* (*d*), *Aspdin* v. *Austin* (*e*), *Dunn* v. *Sayles* (*f*). The covenant is, that the money shall be paid; and the breach is that the Company has not paid; *non constat* that some one else might have paid, and so no breach has been committed.—He also cited *Morgan* v. *Birnie* (*g*), *Max* v. *Roberts* (*h*), *The Lancashire Canal Company* v. *Parnaby* (*i*), *Otway* v. *Holdips* (*k*), and *Kyan* v. *The Anti-Dry Rot Company* (*l*).

WILDE, C. J.—The objections to the declaration cannot

(*a*) 3 Bing. N. C. 433.
(*b*) 6 B. Moore, 199.
(*c*) 10 M. & W. 335.
(*d*) 2 C., M. & R. 61.
(*e*) 5 Q. B. 671.
(*f*) Id. 685.
(*g*) 9 Bing. 672.
(*h*) 12 East, 89.
(*i*) Ante, Vol. 1, p. 696; *S. C.*, 11 Ad. & El. 223.
(*k*) 2 Mod. 266.
(*l*) In the Exchequer, not reported.

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prevail, and the pleas are bad. The second count, which is the subject of objection, sets out certain articles of agreement by which the plaintiff had undertaken to sell absolutely to the defendants certain patents, and to give them the benefit of all improvements, the subject of those patents, that might be made; and it was agreed that this contract of sale should be executed when an act of Parliament should be obtained for rendering the sale valid, and that, in the meantime, an exclusive license to use the patents should be granted to the defendants, which had been done; so that the plaintiff had parted with all that he was to give, and the defendants had received all that they were to receive. It then sets out a covenant that the sum of £15,000 in cash should be paid to the plaintiff, as soon as conveniently could be done, out of the money raised by the first instalments or calls on the shares in the Company. The question is, what is the effect of that covenant—whether the Company were absolutely bound to pay £15,000, or whether it was a covenant to pay out of the money to be raised, and only to attach if it were raised? The words of the covenant, as appears from the second count, are to pay "out of the money raised." Does that mean money to be raised, or money already raised? There are expressions used consistent with the fact of the money being actually in hand, and there is an entire absence of all matters which would have been there, if it had been the case, that the money had not been raised. It is objected that no time is fixed for raising the money, and that there is no power to raise it shewn. If it was the intention that the money should be raised at some future time, the agreement, one would expect, would shew when, and how, and by whom it was to be raised; but the absence of everything to secure payment to the plaintiff is strong to shew the true construction to be, that payment was to be made out of a fund in hand, and there appears nothing to control that intention. But suppose it to be otherwise, and the covenant be to pay out

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of money to be raised, how does the case in Modern Reports apply? That was an obligation to pay money on a bill of costs being stated by two persons chosen by the parties, and though no bill was stated, the refusal of one party to appoint an arbitrator was held a forfeiture, making the money payable. In the present case, the covenant in the second count is to pay, and the breach, that the defendants did not pay, alleging that they could and might have raised the money, and that a reasonable time within which they could have done it, had elapsed. That is again consistent with the money having been raised at the time of making the agreement. But suppose it was not then raised; a default after a reasonable time is shewn, and they are liable for the breach of the obligation. Collecting the intention of the parties from the deed, I think that this was an absolute covenant to pay out of money already raised or of calls, which became absolute by reason of the defendants being able to raise funds and not having done so. All the pleas but the twenty-first and twenty-second were disposed of during the argument. The answer to these two is complete. The declaration shews a recital in the deed that the Company was registered and incorporated. If by the twenty-first plea be meant a denial of the registration in fact, the parties are estopped by a deed; if a denial of the fact of registration and incorporation be not meant, then the words "duly and lawfully" are used to put matter of law in issue for the jury, and the plea is bad upon that ground. I think, however, that the Company were estopped by their deed from setting up this defence, and that they intended by this plea to put in issue matter of law. The cases referred to, only illustrate this, that, where it is intended to put a fact in issue, that may be done, although, incidentally, some matter of law may happen to be necessarily involved. There is the same objection to the twenty-second plea. If there were not these objections, the pleas are, at all events, very ambiguous, as it cannot be seen

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whether they mean to deny the facts absolutely, or to call in question some matters incident with the facts.

MAULE, J.—The declaration I think sufficient. The second count, in effect, states a sale by the plaintiff to the defendants of his patent rights for £15,000. Then comes the covenant to pay. It is insisted that there is no covenant to raise money by calls. I agree with that; and I think there is no breach of covenant in not making calls. It is said that it is a condition precedent that there should be funds, out of the calls; that is not the common sense of the declaration. The covenant is a simple covenant to pay: it points out a fund from which payment is to be made; but it is not a condition precedent that such a fund should furnish the means of payment; it is as if it had been a covenant to pay by an acceptance; that is, a covenant to pay in a particular manner. Putting it, however, at the highest, it is a covenant to pay, provided the Company shall be in receipt of money arising from calls. Then *Otway* v. *Holdips* shews that, for the performance of a condition, you may allege that you have done all in your power, but have been prevented by the other party from a strict performance of it. The twenty-first and twenty-second pleas are so bad, that they have no goodness in them. I concur in what has been said by the Lord Chief Justice. One of them expressly, and the other impliedly, admits that the Company had a certificate of complete registration. The act puts a certificate upon the footing of a patent incorporating the Company; but, to guard against the undue issuing of a certificate, certain things are directed to be done previously,—those done, on the issuing of the certificate, the Company becomes an indisputable corporation. The pleas say nothing to controvert the effect of the certificate.

CRESSWELL, J.—The question on the declaration is the simplest possible. Here is a covenant to pay out of calls;

and the plaintiff says you have not paid me out of calls, or in any other way. Then come the words, "as soon as conveniently may be;" and the declaration alleges that a convenient time has elapsed. The defendants, therefore, are responsible for the breach. The pleas are clearly bad.

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WILLIAMS, J., concurred.

Judgment for the plaintiff.

COURT OF QUEEN'S BENCH.

Trinity Term, 1847.

BEALE *v.* MOULS, HULLMANDEL, and EKIN. *July* 7.

ASSUMPSIT.—The first count was on an agreement for not accepting or paying for the boiler and machinery of a steam carriage. There were also counts for goods bargained and sold, for work and labour, for money paid, for interest, and on an account stated.

Mouls and Ekin pleaded separately, amongst other pleas, non assumpsit.

In assumpsit against A., B., and C., three members of a committee of a proposed company, for not accepting or paying for machinery, for goods bargained and sold, and on an account stated, it appeared that the committee, of which A. and B. were members, had ordered the machinery, under a written contract, prior to the time of C.'s joining the company. By the terms of the contract, the plaintiff was to be allowed to draw such sums monthly as he wished, not exceeding the price of the work done. Subsequently C. joined the Company, and became one of the committee, and during that time, as the work progressed, advances were made according to the terms of the contract. C. took an active part in making experiments and suggesting alterations in the works, and on one occasion promised payment:—*Held*, first, that as C. was not liable on the special contract, he being no party to it, there was no ground for implying a second and new contract, to which C. was a party, from his having united in giving directions about the machinery, or from his subsequent promise of payment, or from his having afterwards acquired an interest in the subject-matter of the contract, and therefore that the plaintiff was not entitled to recover on the count for goods bargained and sold; secondly, that C.'s promise of payment being without consideration, and the promise of him only, was insufficient to support the account stated; thirdly, that by the payments on account the property did not pass to all the defendants, for, if it did pass, it was according to the contract under which the payments were made, and to that C. was not a party.

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Hullmandel suffered judgment by default.

The cause was tried before *Wightman*, J., at the Middlesex sittings after Easter Term, 1846, when it appeared that the action was brought to recover the sum of 492*l.* 0*s.* 6*d.*, the balance due of the price of a boiler and machinery, manufactured by the plaintiff for the committee of a proposed Company, called "The Common Road Steam Carriage Conveyance Company," of which the defendants were members. The order was in the first instance given to the plaintiff verbally by the committee, but was afterwards reduced into writing as a resolution of the committee, and forwarded to the plaintiff in a letter dated the 28th of November.

The following was the resolution:—

"Thursday, 14th November, 1839.

"Resolved, that Mr. Beale be requested forthwith to proceed with the construction of the boiler and machinery under the direction of the committee of works, on the terms and conditions following: that Mr. Beale shall be allowed monthly to draw such sums as he may wish, not exceeding the price of the work done and materials supplied for the time being, and that the work be completed, if practicable, by the beginning of February, 1840. (Signed by Mr. Theobald, the chairman of the committee)."

At this time, Hullmandel and Ekin were, and for some time previously had been, members of the committee; but Mouls did not join the Company until the month of January, 1840, when he became an active member of the general committee and of the committee of works.

At a meeting of the general committee of the 7th of January, at which Mouls and Hullmandel were present, the following minute was made in their book:—"Mr. Beale's letter, requesting £200 on account, having been read,—Resolved that the same be paid. Cheque written accordingly."

And on the 15th of January, the following minute was proved:—"The solicitors reported that the £200 had been paid to Mr. Beale."

The works having been commenced, the plaintiff, during their progress, constantly attended the general committee and the committee of works, and from them received suggestions for alterations and deviations in the plans &c., and incurred considerable expense in making such alterations. It further appeared that, subsequently to Mouls' joining the committees, payments on account of the works had been made to the plaintiff, including the before-mentioned sum of £200, to the amount of £900.

The following letter from Mouls, in answer to one from the plaintiff asking for payment, was, amongst others, given in evidence:—

"Dear Sir,—On my return from the country, I find a letter from you respecting the settlement of your account. I should think that you are perfectly aware I am quite ready to pay my portion of it; and if every one connected with it had been equally so, it would have been settled many months since. You have done your work, and, of course, expect your money; but I do say, it will be using me very hardly, and Mr. Goldney, whom, I hear, you have wrote to, if you take proceedings against us, who have always done our utmost to push the business forward. * * * If something definite is not settled, we (that is, Mr. Goldney, Mr. Ekin, Mr. Hullmandel, and myself) intend taking an opinion on the question, of how we are to proceed to get our share of the defaulters."

The machinery &c. not having been sent for, the plaintiff, in November, 1844, sent the following notice to the committee, and then brought this action:—

"To the Committee of the Common Road Steam Conveyance Company.—I hereby give you notice, that the steam carriage, together with the machinery and work manufac-

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tured and done for you by me, pursuant to the orders I have received from your board, is ready for delivery on demand at my factory at East Greenwich; and I beg to call upon and require you, to send for, receive, and accept the same within ten days from the date hereof, or to inform me within the said ten days at what place and when I shall deliver the same to you, or to such person as you may authorise for the purpose of receiving the said carriage, machinery, and work."

At the trial, it was objected, on behalf of the defendant Mouls, that, inasmuch as the contract declared on in the first count arose out of the resolution of November, 1839, prior to the time of his joining the Company, he could not be liable on that contract; nor could he be liable under the common counts for goods bargained and sold, as they were sold under the special contract. The learned judge being of that opinion, nonsuited the plaintiff, giving him leave to move to enter the verdict for him for 492*l.* 0*s.* 6*d.*

Humfrey having obtained a rule accordingly, citing *Maudslay* v. *Le Blanc* (*a*) and *Ex parte Peele* (*b*),

Crowder and *Butt* (with whom was *Peacock*) now shewed cause (*c*).—Mouls is not liable on the special contract, because it was made before he had become a member of the Company; nor does it make any difference that he was a member at the time of its completion, because there can be no ratification of a contract by a stranger: *Ex parte Peele* (*b*). On this principle, one partner cannot be sued for goods supplied to the firm before he joined it: *Wilson* v. *Bailey* (*d*); nor for a specific chattel, though delivered after he became a partner: *Whitehead* v. *Barron* (*e*); and this principle is

(*a*) 2 Car. & P. 409.
(*b*) 6 Ves. 602.
(*c*) Before Lord *Denman*, C. J., *Patteson*, J., *Coleridge*, J., and *Wightman*, J.
(*d*) 9 Dowl. 18.
(*e*) 2 Mood. & Rob. 248.

applicable to committee-men of railway schemes: *Barnett* v. *Lambert* (*a*). The defendants cannot be liable on the common counts, because the evidence shews that the work was done &c. under the special contract, to which Mouls was no party; and as to the account stated, there was no account stated, as far as Mouls is concerned, of a legal liability.

Humfrey, *Petersdorff*, and *H. J. Hodgson*, contrà.—The special contract was founded on the resolution of November; but that was a mere proposal, and, until accepted, was binding on neither party: *Vaughton* v. *Brine* (*b*), and *Lucas* v. *Beach* (*c*). The proposal was accepted on the payment of the £200 in January, and then became a binding contract; and Mouls, then being a member of the committee, is liable in this action jointly with the other defendants. But if the contract subsisted before Mouls joined the Company, there is evidence of an adoption of that contract by him, and there are authorities to shew that there may be such an adoption: *Ex parte Jackson* (*d*); Story on Partnership, ss. 152, 153; Collyer on Partnership, 305; *Lloyd* v. *Ashby* (*e*); *Helsby* v. *Mears* (*f*); Smith's Merc. Law, 50. [*Coleridge*, J.—Your argument must be, that the contract is ambulatory till it is completed, and whoever may join the Company, in the meantime, is liable.] The plaintiff's argument need not go to that length. At any rate, the plaintiff may recover against all the defendants under the common count, nothing remaining to be done on the contract but the payment of the money. The work became vested in the defendants in portions, as they were finished and the instalments payable; and the defendants were all members of the committee at those times. On the

(*a*) Ante, Vol. 4, p. 308; *S. C.*, 15 M. & W. 489.
(*b*) 1 Man. & Gr. 359.
(*c*) Id. 417.
(*d*) 1 Ves. jun. 131.
(*e*) 2 B. & Ad. 23.
(*f*) 5 B. & C. 504.

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payment of £200 in January, the first portion vested in the defendants: *Elliott* v. *Pybus* (*a*), *Boulter* v. *Arnott* (*b*). It is laid down in Chitty on Contracts, p. 379, 3rd ed.: "Where the contract provides that the articles shall be manufactured under the superintendence of a person appointed by the purchaser, and also fixes the payments by instalments, regulated by particular stages in the progress of the work, the general property in the materials used in the progress of the work vests in the purchaser at the time when they are put to the fabric under the approval of the superintendent, or, at all events, as soon as the first instalment is paid." They also cited *Clarke* v. *Spence* (*c*), *Mucklow* v. *Mangles* (*d*), and *Woods* v. *Russell* (*e*).

Cur. adv. vult.

Lord DENMAN, C. J.—This was an action of assumpsit against the defendants, three of the members of a company, or proposed company, called The Common Road Steam Conveyance Company, for not accepting or paying for a steam carriage. The declaration contained a special count, and counts for goods bargained and sold, for work and labour, money paid, and upon an account stated. It was perfectly clear that the special count was not supported by the evidence. It was founded upon a contract said to have been made by the defendants with the plaintiff, and the terms of which were set out. Such a contract in its terms was proved, but made at a time anterior to that when the defendant Mouls was shewn to have become a member of the Company. In the course of the argument the special count was in effect abandoned, and the question ultimately turned upon the count for goods bargained and sold, under which it was contended, that the plaintiff was at all events entitled to a verdict. But it appears to us, that the plain-

(*a*) 10 Bing 512.
(*b*) 1 Cr. & M. 333.
(*c*) 4 Ad. & Ell. 448.
(*d*) 1 Taunt. 318.
(*e*) 5 B. & Ald. 942.

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tiff's right to recover upon that count is met by the same objection. The contract for building the steam carriage was made by the plaintiff with a committee of the Company on the 14th of November, 1839, and, as the work proceeded, alterations were made in its construction from time to time, with the approbation, and sometimes at the suggestion, of the members of the committee. In January of the following year the defendant Mouls became a member, and took an active part in trying and making experiments with the carriage; and, upon an application for money by the plaintiff, had, on one occasion, promised payment. Under these circumstances it was contended that the three defendants were liable, not upon the original contract of November, 1839, under which the building of the carriage had commenced, and which was the only express contract proved, but upon a new contract in January of the following year, to be implied from the circumstance of Mouls and the other two defendants, who were parties to the original contract, uniting at that time in giving directions about the carriage, and from the subsequent promise of payment by Mouls, who was not a party to the original contract. But we are of opinion that there is not sufficient grounds for implying such new contract. Only one contract, in fact, was proved, and there is no evidence that it ever was rescinded by those who were parties to it. The circumstance of Mouls afterwards acquiring an interest in the subject-matter of the contract will not make him a party to that contract; and his promise of payment, as far as his liability is concerned, was without consideration; nor will that promise support the count upon an account stated, as it was the promise of Mouls only. The first time Mouls appeared as a member of the projected company was on the 7th of January, 1840, when he, with other members of the Company, authorised a payment of £200 to the plaintiff, on account of a steam carriage then building; and it was said, that by this payment the property in the carriage, as

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far as it was built, passed to the defendants, according to the decision in *Woods* v. *Russell*. It is not necessary to consider how far that case may be applicable to this, as to the property passing by the payment on account; because we think that if the property did pass, it would pass according to the contract under which the payment was made, to which Mouls was not a party, and that it would not have the effect of vesting the property in him. The case of *Helsby* and *Mears* was also relied upon, as shewing that a subsequent partner may be bound, by a contract made with the partners before he joined them. In that case a contract had been made as to the terms upon which goods should be carried by some of the defendants' partners, as carriers, before the incoming partner joined them; and it was held, that, the business being carried on as usual, he was bound by the previous contract. But in that case a new contract arose upon the delivery of each fresh parcel of goods for carriage, and the only question was as to the terms of such new contract; and nothing more appearing, it was presumed that the new partner agreed to carry upon the same terms as before. This case might have applied if other steam carriages had been ordered after Mouls joined the undertaking, and nothing had been said as to the terms; but it does not apply to the present case. Upon the whole, therefore, we are of opinion that the nonsuit ought to stand.

Rule discharged.

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COURT OF EXCHEQUER.

Michaelmas Term, 1847.

EGGINGTON *v.* CUMBERLEDGE. *Nov.* 4.

In an action by an attorney for his bill of costs, against a provisional committee-man of a railway company, to prove a delivery of the bill under the 6 & 7 Vict. c. 73, s. 37, the plaintiff proved that he enclosed his bill in a letter to the solicitor of the company, and sent it to his house, and that the bill was afterwards laid before two meetings of the provisional committee, at one of which the defendant was present:—*Held*, sufficient.

ASSUMPSIT for work and labour done and performed by the plaintiff as an attorney, for money paid, and on an account stated.

Pleas—*first*, non assumpsit; *secondly*, no signed bill delivered one month before action brought.

The cause was tried before *Coleridge*, J., at the last Summer Assizes for the county of Stafford, when it appeared that the plaintiff, an attorney, was employed by the defendant, one of the provisional committee of the Birmingham and Manchester Direct Railway Company, as the attorney and local agent of the Company, in which character the plaintiff's cause of action arose. The defendant had been an active member of the provisional committee, and had on several occasions taken the chair at their meetings. The work having been completed, Mr. Bainbrigge, the general solicitor of the Company, in obedience to directions given to him at a meeting of the provisional committee, at which the defendant was not present, wrote to the plaintiff for his bill of costs, who, on the 8th of January, 1847, enclosed it in a letter sent to Mr. Bainbrigge at his house. The bill was, on the 13th, laid before a meeting of the provisional committee, the defendant being present, when Mr. Bainbrigge was directed to write to the plaintiff to know what deduction he would make in his bill. The bill was again laid before another meeting of the provisional committee, on the 14th of February, by the secretary, the

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defendant being absent. The action was commenced in June, 1847.

At the trial, it was contended, on behalf of the defendant, that these facts did not constitute a delivery of the bill pursuant to the 6 & 7 Vict. c. 73, s. 37. The plaintiff, however, had a verdict for 581*l.* 13*s.* 3*d.*, leave being given to the defendant to move to enter a nonsuit or a verdict for him, if the Court should think the second plea to have been proved.

Whateley now moved (*a*).—There was no proof of a delivery, within the statute, to the party to be charged, or left for him at his "counting-house, office of business, dwelling-house, or last known place of abode," within the 6 & 7 Vict. c. 73, s. 37 (*b*). *Eicke* v. *Nokes* (*c*) is precisely in point, in which it was held not to be sufficient evidence of delivery of a signed bill at the defendant's abode, that a signed bill was delivered at a particular place, not shewn to be his abode, and that he afterwards gave this to his attorney who attended the taxation of costs. Lord *Tenterden* says—"Where an act of Parliament requires a particular thing, I must see that it is proved. The admission also furnishes no answer to the objection. The plaintiff might prove under the commission, without proving the delivery of a signed bill. The defendant signs an admission of the amount to

(*a*) Before *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Rolfe*, B.

(*b*) Which enacts, "that, from and after the passing of this act, no attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to, or left for him at, his counting house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements," &c.

(*c*) Moo. & Mal. 303.

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facilitate his doing so. I cannot consider this either as an admission that such a bill had been delivered, or as a waiver of his right to have such a one before he can be personally charged upon such a claim." Here the bill was sent to the house of the attorney of the Company, Mr. Bainbrigge. [*Parke*, B.—In this case, the bill came into the possession of the defendant and others, his partners, and was afterwards in the possession of the officer of the Company; that was evidence of its having been delivered to the defendant. *Alderson*, B.—*Eicke* v. *Nokes* is distinguishable from this case; there it did not appear that the bill came into the possession of the defendant one month before action brought.] If this be held to be a sufficient constructive delivery, it will be going further than any other case.

POLLOCK, C. B.—There will be no rule in this case. The case cited does not apply, because it did not appear in that case, as pointed out by my Brother *Alderson*, that the bill came into the hands of the defendant one month before action. The statute, therefore, had not been complied with. Here, however, a bill duly signed has been in the possession of parties, who might have been sued with the defendant, and at a meeting of them when he was present; therefore, there has been a due delivery of the bill pursuant to the statute.

ALDERSON, B.—The defendant was present at the meeting before which the bill was laid. If this is not a delivery to the defendant, I know not what is a delivery.

PARKE, B., and ROLFE, B., concurred.

Rule refused.

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COURT OF EXCHEQUER.

Michaelmas Term, 1847.

Nov. 16.

DUKE and Others *v.* TUCKER.

A rule for judgment as in case of a nonsuit having been obtained in an action against an allottee of shares for the non-payment of deposits, the Court, upon an affidavit stating the pendency of another cause between the plaintiffs and another defendant, which had been turned into a special case, and wherein the principal questions of law and fact raised in this action would, as the defendant believed, be decided, enlarged the rule, the plaintiff undertaking to be bound by the result of the special case.

A RULE nisi for judgment as in case of a nonsuit having been obtained on behalf of the defendant—

J. Brown shewed cause (*a*) and produced an affidavit, which stated, "that the action was brought by the plaintiffs, as the committee of management of the Dorking, Brighton, and Arundel Atmospheric Railway Company, against the defendant, as an allottee of shares, for the non-payment of his deposits; that the defendant had pleaded several pleas raising difficult questions of law of a novel character; that the plaintiffs were advised, and the deponent believed, that the plaintiffs had a good cause of action against the defendant; that the reason of the plaintiffs not having proceeded to trial was, that a certain other cause, wherein the present plaintiffs were the plaintiffs, and one A. B. the defendant, wherein the same question arose as to the defendant's liability, had been made a special case; that no loss of time had taken place in stating the same, but that it had not been finally settled; that the deponent had been advised by counsel, and verily believed, that the special case raised all the principal questions of law and fact which were at issue in this cause, and would, when judgment was obtained thereon, decide the same." He stated that the plaintiffs in this action were willing to be bound by the decision of the Court on the special case.

(*a*) Before *Parke*, B., *Alderson*, B., and *Rolfe*, B.

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Gray, contrà, submitted, that the defendant had no guarantee that the questions raised in the special case were the same as those raised in the present, and that the affidavit, stating the belief of the deponent that the special case would raise the principal questions of law and fact at issue in this cause, was insufficient. But the Court enlarged the rule to the sittings after Trinity Term next, the plaintiffs undertaking to be bound by the result of the special case.

COURT OF COMMON PLEAS.

Michaelmas Term, 1847.

BAKER and Another *v.* PLASKETT. *Dec.* 7.

In assumpsit for not accepting and paying for scrip shares in a railway company, the defendant pleaded, that, after the 1st of November, 1844, divers persons, exceeding the number of twenty-five, were united in partnership and established as a joint-stock company, in England, for the purpose of executing works which could be carried into execution without the authority of Parliament; that the said company had not been formed or established on or before the 1st of November, 1844, nor had the said company been incorporated or authorised by statute; that the said company had not obtained any certificate of complete registration under the 7 & 8 Vict. c. 110; that the said shares in the declaration were shares and interests in the said company. Replication, de injuriâ. At the trial it appeared, that, in 1843, S., an engineer, went to India for the purpose of introducing there railways generally; that he proposed a line for the execution of which the company in question was established; and that certain persons met together there for the purpose of assisting him in getting up a company; that, in July, 1844, he got a draft deed of settlement prepared in India, and that he brought it with him to England, where he arrived after the 3rd of November, 1844, and that, subsequently, prospectuses were issued. The judge left it to the jury to say, whether the company had been *commenced to be formed* before the 1st of November, 1844:—*Held*, that the direction of the judge was right, the 26th section of the 7 & 8 Vict. c. 110, prohibiting the sale of shares in such a company if the formation of it shall have been *commenced* after the 1st of November, 1844, and it shall not have obtained a certificate of complete registration; but that these facts did not support the issue.

Semble, that the plea, though bad on special demurrer, for not shewing that the company had not been *commenced* to be formed before the 1st of November, 1844, was good after being pleaded to.

ASSUMPSIT for not accepting and paying for scrip receipts of the East India Railway Company, and on the common indebitatus money counts. Ninth plea (*a*), that, before

(*a*) Founded on the 7 & 8 Vict. c. 110, ss. 2 and 26. Sect. 2 enacts, "That this act shall apply to every joint-stock

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the making of the said alleged contract and promise in the said first count mentioned, and before the accruing of the alleged causes of action in the said first count mentioned, or any of them, or any part thereof, and after the 1st day of November, 1844, to wit, on the 31st day of December, 1845, divers persons, whose names are to the defendant unknown, exceeding the number of 25 (without including any admission into the partnership hereinafter mentioned, subsequent to the formation thereof, on devolution or other act in law), consisting, to wit, of the number of 30 persons, had been and then were united in partnership, and established as a joint-stock company in that part of the United Kingdom of Great Britain and Ireland called England, for the purpose of executing, for profit to the said partnership, certain works which then might and could, and still can be carried into execution without obtaining the authority of Parliament; that is to say, for the purpose of making a certain railway in that part of her

company as hereinafter defined, established in any part of the United Kingdom of Great Britain and Ireland, except Scotland, or established in Scotland, and having an office or place of business in any other part of the United Kingdom for any commercial purpose, or for any purpose of profit, or for the purpose of assurance or insurance (except banking companies, schools, &c.). Provided nevertheless, that, except as hereinafter specially provided, this act shall not extend to any company for executing any bridge, road, &c., which cannot be carried into execution without obtaining the authority of Parliament."

Sect. 26 enacts, "And further, with regard to subscribers, and every person entitled, or claiming to be entitled to any share in any joint-stock company, the formation of which shall be *commenced* after the 1st of November, 1844, that, until such joint-stock company shall have obtained a certificate of complete registration, and until any such subscriber or person shall have been duly registered as a shareholder in the said registry office, it shall not be lawful for such person to dispose, by sale or mortgage, of such share, or of any interest therein; and that every contract for, or sale or disposal of such share or interest, shall be void; and that every person entering into such contract shall forfeit a sum not exceeding 10*l.*," &c.

Majesty's dominions called India, to wit, a railway to be called the East India Railway. And the defendant further saith, that the said partnership and company hath not been *formed or established* either by or in the names of any other person or persons whatsoever, or in any way howsoever, on or before the 1st day of November, 1844, nor hath the said partnership or company ever at any time been incorporated by statute or charter, or authorised by statute or letters patent to sue or to be sued in the name of any officer or person. And the defendant further saith, that the aforesaid partnership or company had not, at the time of the making of the alleged contract and promise in the first count mentioned, or at the time of the settlement, purchase, or payments by the plaintiffs, as in the first count mentioned, or at any time before the commencement of this suit, obtained any certificate of complete registration under or in pursuance of the provisions of a certain act of Parliament made and passed in a session of Parliament holden in the 7th and 8th years of the reign of her Majesty Queen Victoria, for the registration, incorporation, and regulation of joint-stock companies. And the defendant further saith, that the said shares in the first count mentioned, and all and every of them, were, at the time of the making of the contract and promise in the first count mentioned, and of the said settlement, purchase, and payments by the plaintiffs, as in the first count mentioned, shares and interests in the aforesaid partnership and company claimed by divers persons, whose names and number are to the defendant unknown. And the defendant further saith, that the said scrip receipts in the said first count mentioned, and all and every of them, were scrip receipts purporting to entitle the holder thereof to the said last-mentioned claimed shares and interests in the said partnership and company. And the defendant further says, that the said shares and scrip receipts in the said first count mentioned

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were not, nor were any or either of them, other or different shares or scrip receipts than as last aforesaid. Verification.

Replication—de injuriâ.

The cause was tried before *Erle*, J., at the London Sittings after Trinity Term, 1846, when it appeared from the evidence of Mr. Stephenson, an engineer, that in the year 1843 he went, on his private account and at his own cost, to India, for the purpose of introducing steam navigation and railways generally in India; that during his stay there a line was suggested between Mirzapoor and Delhi, and that, for the purpose of assisting him in getting up a company, certain persons met together and discussed the subject with him; and that he spoke of it to several persons, many of whom agreed to take part in the company when formed; that about July, 1844, he got a draft deed of settlement for a company prepared in India, and brought it to England with him; that he left India in September, and arrived in England after the 3rd of November, 1844, and on his voyage home he drew up a report on the line; that after his arrival in England, in November, 1844, he caused to be prepared, and gave a prospectus of the company to Messrs. Capes & Stuart, the attornies; that the prospectuses were in that month printed, and in May, 1845, the company was provisionally registered. That in 1845 he again went to India, for the purpose of examining the line of country through which the projected railway would pass.

At the trial it was contended, on behalf of the defendant, that these facts proved the ninth plea, and that the Company had not been formed or established before the 1st of November, 1844.

In summing up, the learned judge left it to the jury to say, whether the formation of the Company had been *commenced* before the 1st November, 1844; and he told them that it was not necessary that the Company should have

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been formed before that day; and pointed out to the jury the several things which had been done before that day, and which he said was strong evidence to shew that the Company had been then commenced. The jury found a verdict for the plaintiff.

A rule nisi for a new trial, on the grounds of misdirection and of the verdict being against evidence, having been obtained—

Byles, Serjt., and *Unthank*, shewed cause.—The ninth plea is founded on the 26th sect. of the 7 & 8 Vict. c. 110, but it does not follow the words of the statute, for the plea alleges that the Company was not "formed and established" before the day in question, the statute applying to joint-stock companies commenced to be formed after the 1st of November, 1844. The word "commenced" in the act is equivocal; the formation of the Company, mentioned in the plea, and the commencement of formation, mentioned in the act, mean the same thing. The judge was therefore right in leaving this case to the jury as he did, in order to support the pleadings. The case of *Chambers* v. *Jones* (*a*) shews, that where there is an ambiguity in a plea, the Court will adopt that construction which will make it good. Undoubtedly, if the plea be not equivocal, the time of the formation—not the commencement of the formation—of the Company, ought to have been left to the jury. The word "formed" cannot mean "completely formed;" for if it does, a company could not be formed till all the shares had been taken, and it was completely registered, which is inconsistent with the provisions of the act. The learned judge, therefore, properly left the question to the jury; and there was evidence to shew that the formation of the Company had been commenced before the 1st

(*a*) 11 East, 406.

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of November, 1844. If the Court should think that the formation mentioned in the plea, and the commencement of formation in the act, are not the same, then the plea is bad; the Court will not grant a new trial, as the defendant cannot succeed on the plea.

Whitehurst and *F. Edwards*, contrà, were stopped by the Court.

MAULE, J.—It appears to me that the judge was right in putting that construction on the plea which is now complained of. The plea says that the Company was not formed or established in any manner whatever before the 1st of November, 1844. Although upon special demurrer that might have been held to be a plea which did not sufficiently follow the act of Parliament, yet as it has been pleaded over to, by the plaintiff, it is good. The proper question, therefore, for the jury upon this plea would have been, whether the formation of the Company had been commenced before the 1st of November, 1844; but I do not think that the evidence raised that question. There was an indisputable primâ facie case that this Company was begun after November, 1844, and there was no evidence on the part of the plaintiff to rebut that case. The evidence of Stephenson shewed that he had thought about the railway, and had spoken of it to many persons, some of whom had agreed to become connected with the Company when formed. Having obtained a draft deed in India, he arrived in England after the 3rd of November, 1844; and it was not till some time after that, that the formation of the Company actually commenced; at what time does not appear; but some time between the 4th of November and the month of May, when the provisional registration took place. I therefore think that there was not evidence of any commencement of formation of the Company before the 1st of November, and

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that the judge should not have left that question to the jury. The rule should therefore be made absolute. As to the goodness of the plea, my impression is that it is good, after having been pleaded over to.

CRESSWELL, J.—I agree with the view of the evidence taken by my brother *Maule*. There was evidence of the formation of the Company after the 1st of November, 1844, and none of the commencement of it before.

WILLIAMS, J.—I am of the same opinion. My only doubt has been whether the plea was not bad, so that the plaintiff might be entitled to judgment non obstante veredicto. There is no doubt that the plea would have been bad if it had been demurred to. On pleading over, the Court will, if it can, construe a plea so as to make it good. The averment here may be considered as tantamount to an averment that the formation of the Company had not been commenced before the 1st of November, 1844.

Rule absolute.

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Hilary Term, 1848.

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CONNOP and Another *v.* LEVY (*a*).

Assumpsit by executors of D. The first set of counts was for work done, &c. by D., and promises to him. The second set was for work done, &c. by the plaintiffs, as executors, and promises to them. Second plea to the whole of the declaration, that D. projected an undertaking for a railway, and, in order to induce the defendant to become a member of the provisional committee, agreed, in consideration thereof, to indemnify him from any professional or other charges on account of the said railway, and thereupon the defendant became a member of the provisional committee; that the said work and labour, monies, and accounts in the declaration were respectively done, paid, and stated by D., and by the plaintiffs, as his executors, in and about the surveying of the line of the said railway, and after the said promise of indemnity, and that defendant became liable to the said charges, and made the said promises, only in his character of member of the said committee; that the railway was afterwards abandoned, and the said work done and payments of money became useless to the defendant, and that any money which may be paid by, or damages recovered from, the defendant, will be wholly lost to the defendant, and he will be damnified contrary to the said agreement. Last plea, that the said D. caused the defendant to enter into the promises by fraud:—*Held*, on special demurrer, first, that the first plea was good to avoid circuity of action.

Secondly, that the last plea was properly pleaded to the whole declaration, as the defendant had a right to treat the work done, &c., by the plaintiffs as executors, as being done in respect of the previous contract with D.; and that if the testator, by fraud, procured the original contract, his fraud procured the implied promise arising from the performance of it by the plaintiffs.

ASSUMPSIT by the plaintiffs, as executors of Davey, for work and labour of Davey, for money paid by Davey for the use of the defendant, and on an account stated with Davey, and promises to him, and for work and labour of the plaintiffs as executors, for money paid by the plaintiffs as executors for the use of the defendant, and on divers accounts stated with the plaintiffs, as executors, with promises to the plaintiffs as executors.

Second plea to the whole declaration—That, before the making of the said promises in the declaration mentioned, and in the lifetime of the said Jacob Mills Davey, since deceased, to wit, on &c., the said J. M. Davey projected a certain undertaking, to wit, an undertaking for the formation of a railway, then proposed to be called the Herne Bay, Canterbury, and Dover Railway, and that the said J.

(*a*) Before *Denman*, C. J., *Colcridge*, J., *Wightman*, J., and *Erle*, J.

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M. Davey, being then desirous of forming a company for the purpose of carrying into effect the said undertaking, and in order to induce the defendant to become a member of the provisional committee of the said projected undertaking and Company, did then promise and agree to and with the defendant, that, in consideration that he the defendant would consent to act as one of the provisional committee on the said Herne Bay, Canterbury, and Dover Railway, and such other branches as might be determined on, he, the said J. M. Davey, would indemnify and save harmless the defendant from any professional or other charges on account of the said railway. And the defendant further says, that he the defendant, then relying upon the said promise of indemnity, thereupon did consent to act as one of the said provisional committee, and then became one of the said provisional committee accordingly. And the defendant then became and was a member of the provisional committee of the said Railway Company, in pursuance of his said consent so given as aforesaid, and upon the faith of the said promise of indemnity by the said J. M. Davey, deceased, so to the defendant given, as aforesaid; that the said work and labour so alleged to have been done, and the materials for the same provided by the said J. M. Davey, in the lifetime of the said J. M. Davey, for the defendant, at his request, and the said journies and attendances so made by the said J. M. Davey and his assistants, and the money so paid by the said J. M. Davey for the defendant at his request, were respectively done, provided, made, and paid by the said J. M. Davey in his lifetime, in and about the surveying of the line of the said Herne Bay, &c. Railway as aforesaid; and that the account in the said declaration alleged to have been stated between the said J. M. Davey and the defendant, was stated of and concerning monies alleged to be due and owing to the said J. M. Davey in respect of the said work, labour, journies, and attendances so made and done as

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aforesaid by the said J. M. Davey and his assistants, and of and concerning the said monies so paid as aforesaid by the said J. M. Davey, in and about the surveying of the line of the said railway as aforesaid. And the defendant further says, that the said work and labour, and materials, so alleged to have been done and provided by the plaintiffs as executors of the said J. M. Davey, deceased, since the decease of the said J. M. Davey, for the defendant, at his request, and the journies and attendances so made, and the money so alleged to have been paid by the plaintiffs, as such executors, for the defendant at his request, were respectively done, made, and paid by the plaintiffs, as such executors, in and about the surveying of the line of the said railway; and that the account so alleged to have been stated between the plaintiffs, as executors as aforesaid, and the defendant, was stated of and concerning the said work and labour, materials, journies, and attendances so done and made as aforesaid by the plaintiffs, as executors as aforesaid, and of and concerning the said money so paid as aforesaid, by the plaintiffs, as executors as aforesaid, in and about the surveying of the line of the said railway. And the defendant further says, that the said work and labour was so done, and the said materials so provided, and the said journies and attendances were so made and given, and the said money was so paid, and the said accounts were so stated, as aforesaid, by the said J. M. Davey, deceased, in his lifetime, and by the plaintiffs as his executors, since his decease, respectively, after the making the said promise of indemnity so given by the said J. M. Davey to the defendant as aforesaid, to wit, on &c., and on divers days and times between that day and the commencement of this suit. And the defendant further says, that he, the defendant, became liable to the said professional charges in respect to the surveying of the said line of the said railway, and to the said other charges on account of the said railway, and made the said promises in the declara-

tion mentioned, only in his character of member of the provisional committee of the Railway Company, and not otherwise. And the defendant further says, that after the accruing of the causes of action in the declaration mentioned, and before the commencement of this suit, to wit, on the first day of April, in the year of our Lord 1846, the said undertaking for the formation of the said railway was wholly abandoned, and the said work and labour, journies, and attendances which had been so made and done as aforesaid by the said J. M. Davey, in his lifetime, and by the plaintiffs, as his executors, since his decease, and the payments so made as aforesaid in and about the surveying of the said line of the said railway, then became and was wholly useless and of no value to the defendant. And the defendant avers that any sums of money which may be paid by, or any damages which may be recovered from, the defendant in respect of the said work and labour, journies and attendances in the declaration mentioned, so made and done as aforesaid, or in respect of the other payments in the declaration mentioned, so made as aforesaid, will be wholly lost to the defendant; and the defendant will be damnified to that extent, contrary to the true intent and meaning of the said agreement and promise of the said J. M. Davey, deceased, to indemnify and save harmless the defendant. Verification.

Last plea.—That the said J. M. Davey, deceased, in his lifetime, caused and procured the defendant to enter into the said promises in the declaration mentioned by means of the fraud, covin, and fraudulent misrepresentation of the said J. M. Davey, and others in collusion with him. Verification.

Demurrer to the second plea.—That the said plea, if it discloses a defence at all, amounts to the general issue; that if it confesses any cause of action, it does not avoid it; that it is pleaded to the whole declaration, whereas, at

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most, it could only apply to those counts which allege a cause of action accruing to the deceased; and that it is double and multifarious.

Demurrer to the last plea.—That the said last plea professes to be pleaded to the whole declaration, whereas it is only an answer to a part; and that the said plea, as compared with the declaration, is repugnant and absurd on the face of it.

Joinder in demurrer.—The defendant's points were, that the second and last pleas are respectively good; and that the declaration is bad in law, for that the fourth count, which discloses a cause of action by the plaintiffs in their personal capacity only, is improperly joined with the other counts in the declaration which disclose causes of action by the plaintiffs in their representative capacity.

Crowder, in support of the demurrer.—The second plea is bad, for it sets up a right of cross action against the plaintiffs, the executors of Davey, in the event of his being damnified, but non constat that he has or will be damnified; for though it is admitted that the scheme has been abandoned, there may be deposits sufficient to satisfy the present demand, and so the defendant may not ultimately be damnified: *Morley* v. *Inglis* (*a*). It will be said that this plea is good to avoid circuity of action; but it is by no means certain that such is the effect of the plea, because the plaintiffs would be liable on the agreement to indemnify only in the event of their having assets. [*Coleridge*, J. —The doctrine of circuity of action does not depend on the productiveness of the second action, but whether it is brought to recover the money recovered in the first action.] It is not contended that the unproductiveness of the action on the agreement would be an answer to this plea, but that

(*a*) 4 Bing. N. C. 58.

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the non-liability would, and the plaintiffs would not be liable beyond the assets come to their hands. [*Wightman*, J.—Is not the contract under which the work was done this—in consideration of the defendant allowing his name to be used, he should not be liable?] If that is the contract this plea is bad as amounting to the general issue. This plea is also too large; it ought not to have been pleaded to the causes of action accruing after the death of the testator. *Schofield* v. *Corbett* (*a*) is decisive on this point. The last plea is also bad for this reason, it ought to have excluded from it the work, &c. done by the plaintiffs as executors. [*Erle*, J.—If the work done by the executors was in continuance of the work done by the testator, and under the same contract, and the fraud was committed in the beginning of the contract, it will extend to the subsequent performance by the executors.] If so, that would be setting up a contract different to that declared on, and would be bad, as amounting to the general issue, or at any rate it ought so to be pleaded.

Peacock, contrà.—The second plea is good; it confesses the causes of action in the declaration, and avoids them by shewing that they arise under such circumstances as disentitle the plaintiffs to sue. [*Wightman*, J.—The testator undertakes to save the defendant harmless; suppose that there were deposits sufficient to enable the defendant to pay the present demand?] That cannot be, as it is alleged in the plea that any sum of money which is paid by the defendant will be lost to him; however, if there be sufficient deposits, that ought to be replied. This plea is good to avoid circuity of action. *Carr* v. *Stephens* (*b*), *Turner* v. *Davies* (*c*). *Morley* v. *Inglis* and *Schofield* v. *Corbett* do not apply. It is clear that this plea would have been an answer, if Davey himself were suing; and the plaintiffs cannot be in a better position.

(*a*) 6 Nev. & Man. 527. (*b*) 9 B. & C. 758. (*c*) 2 Wms. Saund. 149.

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As to the last plea, it is correctly pleaded to the whole declaration. It shews that the promises made to the plaintiffs were made in continuance of a contract entered into with the testator; and if that contract be void by reason of fraud, so must be the implied promises arising therefrom. If the promises were made with the plaintiffs not in furtherance of a previous contract of the testator, the cause of action would arise to the plaintiffs in their personal character; and so there would be a misjoinder of counts: either the declaration is bad or the plea is good.

Crowder, in reply.

Cur. adv. vult.

Feb. 26. COLERIDGE, J., now delivered the judgment of the Court. —The first set of counts of the declaration was for work done, and money paid by, and on an account stated with, the testator, Davey. The second set was for the same, by and with the plaintiffs as executors of Davey. The first of the pleas alleged that Davey, being the projector of a company for a railway, agreed, in consideration of the defendant consenting to act on the provisional committee, to indemnify him from any professional or other charges on account of the said railway; that the defendant did consent so to act; that the works, monies, and accounts in the declaration mentioned were respectively done, paid, and stated by Davey, and by the plaintiffs as his executors, in and about the surveying of the lines of the said railway, and after the said agreement to indemnify; that the defendant became liable to the said professional charges in respect of the surveying the railway, and the other charges on account of the said railway, and made the promises only in his character of member of the provisional committee, and not otherwise; that the project was abandoned, and the said work and money paid became useless and of no value; that any sums recovered, on account of the said work and monies paid, will be lost to the defendant, and the defendant

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will be damnified to that extent, contrary to the promise of Davey to indemnify.

This plea shews that the causes of action were, for professional and other charges on account of the railway, comprised within the testator's agreement to indemnify, and that the defendant could recover from Davey or his representatives as much as the plaintiffs can recover from the defendant in respect of these causes of action. The plea therefore is a bar to avoid circuity of action. See *Turner* v. *Davies* (*a*), where the cases of pleas held good as being in avoidance of circuity of action, are collected.

The second of the pleas alleged that the testator caused the defendant to enter into the promises by fraud; and in support of the demurrer to this plea it was contended, that it could not apply to the promises in the second set of counts, which were made after the death of the testator. The defendant answered, that, if he became indebted to the plaintiffs as executors for work done as executors, after the death, and for money paid as executors after the death, it was in the manner to be gathered from the first of the pleas, namely, that a contract was made with the testator for surveying the line, and that the plaintiffs as executors after the death, in performance of that contract, did the work and paid the monies mentioned in the second set of counts, and that the accounts were stated with the plaintiffs in respect thereof; that the counts are applicable to this cause of action, and the defendant has a right so to apply them; and that, if the testator by fraud procured the original contract, his fraud procured the implied promise, arising from the performance of the work, and payment of the money by the executors under the contract. Upon this view we are of opinion that the defendant's answer is well founded, and, therefore, our judgment is for the defendant.

Judgment for the defendant.

(*a*) 2 Wms. Saund. Rep. 150, n. 2.

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COURT OF EXCHEQUER.

Michaelmas Term, 1847.

Nov. 6.

CLEMENTS *v.* TODD.

The plaintiff, by a letter, containing the usual undertaking to sign the parliamentary contract and subscribers' agreement, applied for shares in a railway company provisionally registered. He never signed the parliamentary contract or subscribers' agreement, nor received any letter of allotment, but he paid the deposit and received the scrip certificates for 500 shares. The certificates were in the usual form, and stated that "the parliamentary contract and subscribers' agreement had been signed by the person to whom the certificate was issued." The scheme proved abortive. In an action against one of the managing committee to recover back the deposit:—*Held*, that the plaintiff had put himself in the same position as if he had signed the parliamentary contract and subscribers' agreement.

ASSUMPSIT for money had and received, and on an account stated. Plea, non assumpsit. Upon the trial of the cause before *Pollock*, C. B., at the Middlesex Sittings after last Term, it appeared the defendant was one of the managing directors of "The Hull and Lincoln Direct Railway Company," provisionally registered under the 7 & 8 Vict. c. 110. The prospectus stated the number of shares to be 25,000. The action was brought to recover back the deposit of 2*l.* 2*s.* per share on an allotment of 500 shares. The circumstances were as follows:—The day after the parliamentary deposit was paid into the Bank of England, and the subscribers' agreement and parliamentary contract lodged at the Private Bill Office, the plaintiff, at the office of the Company, signed a letter of application for shares, which contained an undertaking to sign the subscribers' agreement and parliamentary contract when required. No letter of allotment was ever given to the plaintiff, but a minute was entered in the Company's books, that 500 shares were to be allotted to the plaintiff on payment of the deposit. A day or two after, the plaintiff paid the deposit, received the scrip certificates, and gave a receipt for them. The scrip certificates stated, that "the subscribers' agreement and parliamentary contract having been signed by the person to whom this certificate is issued for the number of shares mentioned therein, and a deposit of 2*l.* 2*s.* per share having been paid

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thereon, the shares have been registered in the Company's books." But, in fact, the plaintiff never signed the parliamentary contract or subscribers' agreement. Only 13,000 shares were subscribed for, and the project failed. No fraud was imputed to the directors. The Lord Chief Baron left it to the jury to say, first, whether the scheme was a bonâ fide one; secondly, whether, when the plaintiff took the scrip, he intended to place himself in the same situation as if he had been an original subscriber. The jury found both questions in the affirmative, and a verdict for the defendant.

W. H. Watson (*Dowdeswell* was with him)(*a*), now moved for a rule to shew cause why the verdict should not be set aside and a new trial had, and contended that there was no evidence of any valid contract; that the application for shares, the minute in the Company's books that shares were to be allotted, and the delivery of the scrip certificates, amounted to nothing; that the scheme having proved abortive, the plaintiff was entitled to recover back the deposit: *Walstab* v. *Spottiswoode* (*b*).

ROLFE, B.—The plaintiff has put himself in the same position as if he had signed the deed, the terms of which prevent his recovery in this action.

ALDERSON, B.—He paid the deposit upon the same terms as the parties who actually signed the deed.

PARKE, B.—In effect he has put himself in the same position as if he had signed the deed.

PER CURIAM.—We think it clear there ought to be no rule.

Rule refused.

(*a*) Before *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Rolfe*, B.

(*b*) Ante, Vol. 4, p. 321; S. C. 15 M. & W. 501.

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COURT OF EXCHEQUER.

Michaelmas Term, 1847.

Nov. 9.

GARWOOD *v.* EDE.

The plaintiff applied for and had allotted to him twenty shares in a railway company provisionally registered. He paid the deposit of 2*l.* 12*s.* 6*d.* per share, and signed the subscribers' agreement, which empowered the provisional directors to carry on or abandon the whole or any part of the project, and out of the monies which should come to their hands, by way of deposit or otherwise, to make the necessary parliamentary deposits, and generally to pay all other costs and expenses which they might incur with respect to the project. The scheme proved abortive, and the company was dissolved under 9 & 10 Vict. c. 28. In an action for money had and received against the defendant, one of the provisional committee, to recover back the deposit:—*Held*, that the plaintiff, by executing the subscribers' agreement, had authorised the directors to expend the deposit, and could not therefore recover it back.

ASSUMPSIT for money had and received, and on an account stated. Plea, non assumpsit.

Upon the trial of the cause before *Pollock*, C. B., at the London Sittings after last Trinity Term, it appeared that the defendant was one of the provisional committee of "The Direct Western Railway Company," which had been provisionally registered pursuant to the 7 & 8 Vict. c. 110, and that the action was brought to recover 52*l.* 10*s.*, the amount of a deposit of 2*l.* 12*s.* 6*d.* per share, (being 10*s.* per cent. pursuant to the 23rd section of 7 & 8 Vict. c. 110, and £10 per cent. required by the Standing Orders of Parliament), paid by the plaintiff on twenty shares of £25 each, which had been allotted to him. The scrip certificates for his shares had been delivered to the plaintiff, and he had executed the parliamentary contract and subscribers' agreement. The latter deed was between the shareholders, the provisional directors, and certain trustees; it gave the provisional directors "full power, in their absolute discretion, and at such times and in such manner as they should think fit, to carry the undertaking, or any part thereof, into effect, with any such variations, modifications, and extensions, as were thereby authorised, and to abandon the whole or any part of the said undertaking, and generally to regulate and manage the affairs of or connected with the undertaking, or other-

wise concerning the said company or association; and for that purpose to cause such surveys and estimates to be made as they might think advisable. And also from time to time to adopt, carry into effect, or vary any measures whatsoever, which they might in their judgment consider necessary or expedient for obtaining an act or acts of Parliament in the next or any subsequent session of Parliament, for authorising the construction of the said intended railway or railways, or any part or parts thereof;" and also "full power, out of the money which should come to their hands or be placed to their credit by way of deposit on payment of calls or otherwise, in relation to the said undertaking, to make such deposits or investments as might be required by the Standing Orders of Parliament; and also to pay and allow all such fees, salaries, commission, and recompense, to servants and other persons who might be employed by them, &c., as they should think right, and generally to apply such monies in and towards the fulfilment and enforcement of any bargains, engagements, contracts, arrangements, resolutions or agreements, into which they might have entered, or into which they were, by that deed, empowered to, and should or might enter, for all or any of the purposes aforesaid, and towards the costs of any works or proceedings connected therewith, and in or towards the soliciting, supporting, or opposing a bill or bills in Parliament as therein mentioned, and in obtaining the necessary act or acts for carrying out the aforesaid undertaking, or any part or parts thereof, or in bringing the merits of the said undertaking, or any part thereof, before Parliament as a project, and generally in paying and satisfying all other costs, charges, and expenses or liabilities, which they, or any, or either of them might sustain or incur, or which might have been already sustained or incurred in relation to the said undertaking, or otherwise in pursuance of, or by virtue of, or consistently with, these presents, or in the execution or enforcement of the agreements, provisoes, and stipulations therein contained."

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The necessary capital was not raised, consequently the scheme failed, and the Company was dissolved in the year 1847, under the 9 & 10 Vict. c. 28. The whole of the deposits had been expended, and no fraud was imputed to the directors.

It was contended on behalf of the defendant, that, by the terms of the subscribers' agreement, the plaintiff was precluded from maintaining this action.

The Lord Chief Baron being of this opinion, nonsuited the plaintiff. Leave being reserved to him to move to enter a verdict,

Knowles now moved accordingly.—Admitting that the 10*s.* per cent., which was paid for the general purposes of the undertaking pursuant to the 7 & 8 Vict. c. 110, cannot be recovered back by the plaintiff, he is nevertheless entitled to recover the £10 per cent. deposited pursuant to the Standing Orders of Parliament. That was a deposit for a specific purpose, and the directors had no power to apply it otherwise. [*Parke*, B.—The "subscribers' agreement" provides that the deposits may be applied in payment of any charges and expenses.] The terms of that agreement must be understood to apply only to the 10*s.* per cent.—that part of the deposit which was paid for general purposes; therefore, the £10 per cent., the deposit under the Standing Orders of Parliament—not having been legally appropriated, but used otherwise than the act of Parliament authorises, and the project having proved abortive—is recoverable in this action as money had and received to the defendant's use: *Nockels* v. *Crosbie* (*a*), *Walstab* v. *Spottiswoode* (*b*). [*Pollock*, C. B.—In *Walstab* v. *Spottiswoode* the plaintiff was never jointly interested with the defendant in the project, and the purposes for which the money was paid altogether failed. In this case the plaintiff obtained the

(*a*) 3 B. & C. 814. (*b*) Ante, Vol. 4, p. 321; S. C., 15 Mee. & W. 501.

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scrip on payment of the deposit, and by the execution of the subscribers' agreement he has entered into a new contract, which has given him a joint interest with the defendant in a common undertaking.] The plaintiff contends that the subscribers' agreement does not create a partnership. [*Alderson*, B.—Why may not a number of persons agree by deed to dispose of their money in a particular way? *Parke*, B.—If the deed had authorised the directors, in case of the project being abandoned, to apply the £10 per cent. deposit to the discharge of any other expenses of the undertaking, that would have been perfectly legal.] It is submitted that the words of the deed gave no such authority to the directors. [*Parke*, B.—They almost amount to that. They empower the directors to carry the undertaking, or any part of it, into effect, and out of the money which should come to their hands or be placed to their credit by way of deposit or otherwise, generally to pay and satisfy all costs, charges, and expenses, or liabilities which they might sustain or incur in relation to the undertaking. In effect, therefore, if the undertaking was abandoned, the directors were to apply the money in payment of the expenses incurred; if it went on, the money was to be deposited under the Standing Orders of Parliament.]

PER CURIAM.—The plaintiff disposed of this money by the subscribers' agreement, and it never was money had and received by the defendant for the use of the plaintiff. The nonsuit was, therefore, right.

Rule refused.

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COURT OF EXCHEQUER.

Hilary Term, 1848.

Feb. 11.

JONES *v.* HARRISON.

An applicant for shares in a projected railway company received a letter of allotment in the usual form, on which was indorsed, amongst other things, as follows, "The directors assume the right to carry out their intentions by the adoption of all such measures as they may deem requisite for obtaining the necessary parliamentary powers to form a company for the construction of the railway, &c., and to apply the amount paid for deposits in discharge of any liabilities incurred by them, under the general powers vested in them for the prosecution of the undertaking." The undertaking having failed, in an action by the allottee against one of the directors for a return of his deposits:—*Held*, that the directors must be understood as saying, "we shall apply the deposits in such manner as we think fit for the purpose of carrying the undertaking into effect, and in discharge of any liability we may thereby incur." That the term "general powers" meant those then vested in the directors, which they assumed for the purpose of carrying the undertaking into effect; and that they had a right to apply the deposits for advertisements, surveys, and necessary plans to be deposited at the Board of Trade. That if there had been any question as to the reasonableness of the application of the deposits, it ought to have been left to the jury. That the directors were bound to return any sum expended after it was clear that the undertaking could not go on.

ASSUMPSIT for money had and received, money paid, and on an account stated. Plea, non assumpsit.

The cause was tried at the Summer Assizes, 1847, for the county of Denbigh, before *Maule*, J., when it appeared that the action was brought against one of the managing committee of the proposed Wrexham, Nantwich, and Crewe Junction Railway Company, for the return of the deposit on fifteen shares of the Company, the scheme having been abandoned.

The scheme was proposed in September, 1845, when a prospectus was issued, stating the capital of the Company to be £450,000, in 22,500 shares of £20 each, with a deposit of 2*l.* 2*s.* 6*d.* per share, and giving a form of application for shares.

On the 6th of October, 1845, the plaintiff sent the following application for shares:—

"To the Provisional Committee of the Wrexham, Nantwich, and Crewe Junction Railway Company.

"Gentlemen,—I request you to allot me 100 shares of

(*a*) Before *Parke*, B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

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£20 each in the above undertaking, and I hereby engage to accept the same, or any less number which may be allotted to me, and to pay the deposit thereon, and to execute the parliamentary contract and subscribers' agreement when required."

On the 25th of October, the following letter of allotment was sent to the plaintiff by the secretary of the Company:—

"Wrexham, Nantwich, and Crewe Junction Railway.
(Provisionally registered).
"Capital £450,000, in 22,500 shares of £20 each. Deposit 2*l.* 2*s.* 6*d.* per share.

"Henblas-street, Wrexham,
25th October, 1845.

"Allotment No. 64. "Deposit 31*l.* 17*s.* 6*d.*

"Sir,—I am directed to inform you that the committee of management have, in compliance with your application, allotted to you fifteen shares in this Company on the terms and conditions annexed; and you are therefore required to pay the deposit of 2*l.* 2*s.* 6*d.* per share, amounting to 31*l.* 17*s.* 6*d.*, to one of the undermentioned bankers, on or before the 1st day of November next. In default of such payment being duly made, this allotment will be then cancelled, and the shares appropriated to other applicants.

"I am, &c.,
J. DEVEREUX PUGH,
Secretary.

"Fifteen shares.
"To Mr. Thomas Simon Jones,
"Wrexham.
"Bankers of the Company.
[Here followed the names.]

"On payment of the deposit to the bankers, this letter will be exchanged for a receipt.

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"Terms and Conditions on which the Shares in the Company are allotted.

"The Company is formed for the purpose of constructing a railway from Wrexham to Crewe, (by such route, and with such extensions, as the directors may think necessary on the engineer's report).

"The directors assume the right to carry out their intentions, by the adoption of all such measures as they may deem requisite for obtaining the necessary parliamentary powers to form a company, for the construction of the entire railway, or any part of it, with such branches, extensions, or alterations as they may find expedient, and to apply the amount paid for deposits in discharge of any liabilities incurred by them, under the general powers vested in them, for the prosecution of the undertaking.

"Powers will be applied for, to allow interest at the rate of £4 per cent. per annum on the amount of calls paid until the opening of the line. A subscribers' agreement and a parliamentary contract, in such form and with such provisions as the committee may think necessary, will be prepared and lie at the company's offices for signature from &c., both inclusive. Arrangements will also be made and duly announced for the execution of the deeds by the shareholders resident in or near the provincial towns in which shareholders may reside.

"The shares, with the deposits made thereon, will be liable to forfeiture without notice, in respect of which the subscribers' agreement and parliamentary contract are not signed within the specified time.

"(By order),

"J. D. PUGH, Secretary."

On the 1st November, 1845, the plaintiff paid the deposit of 31*l.* 17*s.* 6*d.* to one of the Company's bankers, and on the 8th December executed the subscribers' agreement

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and parliamentary contract, and received three scrip certificates, of five shares each, in the following form:—

"Wrexham, Nantwich, and Crewe Junction Railway.
(Provisionally registered).

"Capital, £450,000, in 22,500 shares of £20 each, on which a deposit of 2*l.* 2*s.* per share has been paid.

"Scrip certificate. Five shares.

"No. — to — inclusive.

"The holder of this certificate having signed the parliamentary contract and subscribers' agreement, and having agreed to pay all future calls, is the proprietor of five shares in the capital for the time being of the above undertaking.

"G. LEWIS,
"THOMAS EDGWORTH, } Directors.

"Company's office, Wrexham. "J. D. PUGH. "Secretary."

"Entered, 8th December, 1845.

All the shares in the Company were allotted; but though the time for payment of the deposits was extended to the 10th of January, 1846, they were paid only on 3773, realizing a sum of 7,959*l.* 6*s.*; and that sum being exhausted by payments for surveyors and other preliminary expenses, it became impossible to go to Parliament with the bill. The scheme was therefore abandoned; and in December, 1846, the Company was dissolved under the 9 & 10 Vict. c. 28.

Under these circumstances, it was contended at the trial, on behalf of the plaintiff, that, inasmuch as the required capital had never been raised, and the scheme had been abandoned, there was a failure of consideration, and that he was entitled to recover back his deposit in this action; whereas, on the other hand, it was insisted on the part of the defendants that, though the required capital had never been raised, and the scheme had been abandoned, yet, as the letter of allotment reserved to the directors the right to

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apply the deposits in discharge of the liabilities incurred, and as these had exhausted the funds raised, there never was in the defendant's hands money received to the use of the plaintiff. The jury, under his Lordship's direction, found a verdict for the plaintiff, leave being given to the defendant to move to enter a nonsuit if the Court should be of opinion that he was entitled to one, on the construction of the letter of allotment.

Townsend having obtained a rule nisi for that purpose,

Martin and *Welsby* now shewed cause.—There was some evidence of fraud in this case; the plaintiff subscribed to an undertaking in which there were 22,500 shares subscribed, as represented on the scrip, and on which a deposit of 2*l.* 2*s.* per share had been paid. This was not the fact, and its suppression rendered the contract under which the plaintiff paid his deposit void, and so entitled him to recover it back in this action: *Wontner* v. *Shairp* (*a*). The directors, by the letter of allotment, are authorised "to apply the amount paid for deposits in discharge of any liabilities incurred by them under the general powers vested in them for the prosecution of the undertaking," which means, general powers to be vested in them by the subscribers' agreement; but that was fraudulent and void, and therefore the condition on which the directors were to apply the deposits was never fulfilled. [*Parke*, B.—The learned judge reports that no point as to fraud was made at the trial, and the only question therefore is, whether there ought to be a nonsuit on the construction of the letter of allotment, which contains a permission to apply the money. The plaintiff is bound by that, if not by the deed.] At any rate the directors had no power to apply the money until there was a reasonable prospect

(*a*) Ante, Vol. 4, p. 452.

of their being able to carry out the scheme: *Nockels* v. *Crosby* (*a*). [*Parke*, B.—Whether the money was expended with a reasonable prospect of the Company being able to go on with the project, was a question for the jury. If the plaintiff meant to rely on that, he ought not to have consented to a nonsuit on the construction of the letter of allotment. Probably the directors expected that the allottees would perform their contract, and thought that they might fairly go on with the project on the faith that they would do so. It may be that the onus of shewing how much was expended for necessary matters was on the defendant.] At any rate the directors had no right to deal with the money until a sufficient amount had been paid up, to justify a reasonable expectation, that the project would be carried out.

Townsend and *W. L. Foulkes*, contrà, were not called upon.

PARKE, B.—I think that this rule ought to be made absolute. The first question is, whether, on the true construction of this letter of allotment, the directors of this projected company were empowered to apply the deposits of the allottees for such preliminary expenses as they, the directors, thought proper to incur in carrying out the object of the deed. The other question raised is as to the subscribers' agreement executed by the plaintiff. It is alleged to have been obtained by fraud, and contended, on the authority of *Wontner* v. *Shairp*, that there were circumstances in this case which, if they had been left to the jury, would have justified them in coming to the conclusion that the deed was fraudulent, and consequently ought to be considered out of the case altogether, and that the case must be determined without reference to the deed. It does not appear, however, that at the trial the plaintiff's counsel asked the judge

(*a*) 3 B. & C. 814.

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to put to the jury any question on that deed, but consented to his reserving the question of law on the construction of the letter of allotment, for our consideration. If the plaintiff's counsel meant to insist on either of the two instruments having been obtained by fraud, he should have insisted on its being left to the jury; but, according to the note of the judge, the plaintiff's counsel did not allege fraud in the letter of allotment, and indeed if he had, it is difficult to see how he could have made it out. In *Wontner* v. *Shairp* there were circumstances for the consideration of the jury, tending to shew that the execution of the subscription deed had been obtained by a misrepresentation as to the number of shares allotted. We will therefore consider this case on the letter of allotment alone. Now this letter of allotment was issued consequent on an allotment of shares to the plaintiff, made about the same time as the other allotments were made, and the whole question turns on the construction of this document; and I think that on the true construction of it, the directors of the Company must be understood as saying, "We shall apply the money deposited in our hands in such manner as we think fit for the purpose of carrying this undertaking into effect, and in discharge of any liabilities we may thereby incur." That is the meaning of the terms of the letter of allotment, for it says—"The directors assume the right to carry out their intentions by the adoption of all such measures as they may deem requisite for obtaining the necessary parliamentary powers to form a company for the construction of the entire railway, or any part of it, with such branches, extensions, or alterations as they may find expedient, and to apply the amount paid for deposits in discharge of any liabilities incurred by them under the general powers vested in them for the prosecution of the undertaking." The expression "general powers" does not mean powers to be vested in them afterwards, but general powers already vested in them, and which they had assumed for the purpose of carrying the undertaking into effect; and they may, consequently, upon

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this construction so apply the deposits. If, indeed, they had made an unreasonable use of the deposits, that would have raised a different question, and one which ought to have been left to the jury; but, as it is, the directors had a right to apply them for advertisements, surveys, and necessary plans to be deposited at the Board of Trade; and every reasonable expense ought properly to be chargeable on the deposits. If, therefore, all the deposits were absorbed by these means, the plaintiff would not be entitled to recover anything from the directors; otherwise, they must refund the surplus, as they also must any sum expended after the undertaking was abandoned, or after it became clear that no sufficient number of subscribers could be obtained to enable them to go on with it. The terms of the letter of allotment distinguish this case from that of *Walstab* v. *Spottiswoode* (*a*), where no such power was reserved to the directors of the projected company. The directors will be bound to return any surplus or sum expended after it became clear that the undertaking could not be proceeded with; but if all the deposits have been reasonably expended in furtherance of the undertaking, the plaintiff cannot recover.

ALDERSON, B.—The plaintiff agrees that the directors may employ the money deposited in their hands for the legitimate purposes of the projected company. If it has been so expended, he cannot have any right to recover it back.

ROLFE, B.—I am of the same opinion; and I think that the term "general powers," in the letter of allotment, means those powers which "we the directors are now exercising—which we assume."

PLATT, B., concurred.

Rule absolute.

(*a*) Ante, Vol. 4, 321; *S. C.*, 15 M. & W. 501.

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COURT OF EXCHEQUER.

Easter Term, 1847.

May 8.

RENDEL and Another *v.* MALLESON.

The plaintiffs having brought separate actions against two directors of a railway company for the same amount, and the defendant in the one action having paid into court a sum of £300, the Court allowed the defendant in the other action to plead payment into court of the £300, without actually paying it in.

THIS was an action by engineers against a director of the Armagh, Coleraine, and Portrush Railway Company, to recover a sum of £1020, for surveying and superintending the railway. A similar action had been brought by the plaintiffs against another director of the Company of the name of Tabor, for the same amount, who had paid into court £300, and had pleaded other pleas. The plaintiffs did not reply to the pleas in *Tabor's* action, but, this cause being at issue, gave notice of trial. A rule was thereupon obtained, calling upon the plaintiffs to shew cause why the proceedings in this action should not be stayed until the determination of the case of *Rendel and Another* v. *Tabor*, unless the plaintiffs would consent to give credit for the sum of £300 paid into court in that action, as though paid into court in this action, or otherwise give the defendant in this action the benefit thereof, and agree to proceed in this action only for such further sum as might be due to them from either or both of the defendants in the two actions; the defendant in this action undertaking, that, if the plaintiffs elect to proceed in the action against the defendant Tabor, and any sum is recovered in the said action against him over the said sum of £300, he, the defendant, will pay the same and the taxed costs therein, if not paid by the defendant Tabor.

Sir *F. Thesiger* now shewed cause.

Bramwell, contrà.

ALDERSON, B.—I think that this rule ought to be made absolute for allowing a plea of payment into court of £300, without paying the same in.

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COURT OF CHANCERY.

BEFORE THE VICE-CHANCELLOR OF ENGLAND.

Ex parte THE MASTER AND FELLOWS OF WORCESTER COLLEGE, OXFORD, *re* BIRMINGHAM RAILWAY COMPANY. *Jan.* 28.

The costs of an application for the interim investment of a sum of money paid by a railway company for the purchase of lands taken by them under the powers of their act from a corporate body—*Held*, upon the special construction of the act, not to be payable by the Company.

THIS was a petition presented by the Master and Fellows of Worcester College, Oxford, and it prayed the investment of a sum of £400, which had been paid into court, by the Birmingham Railway Company, as the purchase-money of certain lands situate at Roade, in the county of Northampton, taken by the railway Company under the powers of their act; and it further prayed the costs of the application.

Mr. *M. Richards*, in support of the petition, contended that, although the acts of the plaintiff did not in express terms give the costs of the investment, yet that they came within the spirit of the act. It was never the intention of the Legislature that individuals were, in consequence of the conversion of their land into money, to be deprived of the profits until a suitable investment in land could be found; and under the 42nd section the Court was allowed to give the costs of the purchases in land, towards which this proceeding may be considered a preliminary step. The *Lord Chancellor* had, in the case of *Ex parte Marshall* (*a*), given a wide construction of the act of Parliament in favour of the equitable rights of parties. *Ex parte Northwick* (*b*) is also an authority for the Court to grant the costs of this application.

(*a*) Antè, p. 58. (*b*) 1 Y. & Col., Ex. Ca., 166.

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Ex parte MASTER AND FELLOWS OF WORCESTER COLLEGE, *re* BIRMINGHAM RAILWAY CO.

Mr. *Speed*, on behalf of the Company, contended that no power was given to the Court under the act to give the costs of the interim investment.

The VICE-CHANCELLOR.—I think the Court is bound to decide all these cases by the words of the act of Parliament, and I sit here to interpret them literally with regard to the rights of the individual. I admit that, in the case cited, I conceived I had kept to the strict letter of the act, but the *Lord Chancellor* was of a different opinion.

(*a*) By the 39th section it was enacted, that if any money should be agreed or awarded to be paid for the purchase of any lands which a corporation should be entitled to, it should, in case the same should exceed 200*l.*, with all convenient speed be paid into the Bank of England, in the name, &c., and there remain until the same should, upon application of the party entitled to the rents, be laid out in the purchase of other lands to be settled to the like uses, "and in the mean time, and until such purchase can be made, the said money may, by order of the said Court upon application thereto, be invested by the said Accountant-general in his name in the purchase of £3 per Cent. Consolidated, or £3 per Cent. Reduced Bank Annuities, or in Government or real securities; and in the mean time, and until such annuities or securities shall be ordered by the said Court to be sold for the purposes aforesaid, or shall be called in or cancelled, the dividends or interest and annual produce thereof, shall from time to time, by order of the said Court, be paid to the party who would for the time being have been entitled to the rents and profits of such lands so to be purchased and settled." —The 42nd section: "That when by reason of any disability or any incapacity of any party entitled to any lands to be taken or used, or in respect of which any compensation or satisfaction shall be payable under the authority of this act, the purchase-money for the same, or the money paid for such compensation or satisfaction, shall be required to be paid into the Bank of England, to be applied in the purchase of other lands to be settled to the like uses, in pursuance of this act, it shall be lawful for the said Court to order the expenses of all such purchases, or so much of such expenses as the said Court shall deem reasonable, together with the necessary costs and charges of obtaining such order, to be paid by the said Company out of the monies to be received by virtue of this act; and the said Company shall from time to time pay such sums of money for such purposes as the said Court shall direct."

I cannot, however, in the present case, depart from what I conceive to be the duty of the Court, viz. to consider and to be bound by the express terms of the act; and although it may be considered hard, I cannot give the petitioners their costs of this application.

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BEFORE VICE-CHANCELLOR OF ENGLAND AND LORD CHANCELLOR.

1846. *June 6th, 17th, & 24th. Nov. 16th & 17th.*

1848. *Jan. 23rd.*

BELL *v.* LORD MEXBOROUGH.

THIS bill was filed, 2nd of April, 1846, by R. C. Bell and R. Chatfield, on behalf of themselves and all other the shareholders of the Direct London and Exeter Railway Company, except such shareholders as were therein named defendants. And it stated (inter alia) that, in April, 1845, William Ancrum entered into communication with D. E. Columbine, solicitor, and they together determined on establishing a joint-stock company for the purpose of constructing a railway to be called "The London and Exeter Direct Railway," and the Company was duly registered, and said W. A. and D. E. C., as the promoters, received a certificate of provisional registration.

That the name of the Company was altered in consequence of a proposed extension to Falmouth and Penzance,

C. and A. were named in the prospectus of a Company provisionally registered as members of the provisional committee, and, at their own request, had 150 shares reserved for them, in common with the other members of that committee. They afterwards refused to accept the shares, or to execute the Parliamentary deed or subscribers' agreement, and never acted in the affairs of the Company, and were not members of the managing committee. Two of the shareholders, on behalf of themselves and other shareholders, except the defendants, filed their bill against the members of both committees, including C. and A. and the secretary of the Company, charging the managing committee with acts of mismanagement, and praying, amongst other things not affecting the defendants C. and A., an account of the property and assets of the Company, including therein the several amounts then due from the defendants (including C. and A.) in respect of deposits on their shares, and also a receiver and injunction, and further praying an account of the liabilities of the Company, and a due application of the assets. To this bill the defendants C. and A. demurred for want of equity:—*Held*, by Lord Chancellor, confirming the judgment of the Vice-Chancellor of England, that the demurrer must be allowed, the plaintiffs having failed to shew by their bill that the demurring defendants were liable, that the plaintiffs had the right to sue them, or that they were necessary parties to the bill.

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and advertisements were published and prospectuses issued of the objects of the Company, and purporting to contain a correct statement of the names of the provisional committee, and committee of management; and one of such prospectuses, circulated in September, 1845, contained the following statements:—"Direct London and Exeter Railway Company, with Extension to Falmouth and Penzance. Capital, £3,000,000, in 120,000 shares of £25 each. Deposit, 1*l.* 7*s.* 6*d.* per share; a further deposit of 1*l.* 5*s.* per share to be paid after the bill has passed the House of Commons, with power to raise £1,000,000 if necessary." The said prospectus also contained a list of forty-one noblemen and gentlemen, members of the provisional committee of the Company (all defendants to the bill), fourteen of whom formed the committee of management of the Company, with power to add to their number, and stating the name of the engineer, solicitors, and other officers of the Company; and the prospectus stated also that the object of the Company was to establish a railway from London to Exeter direct, through Salisbury and other considerable towns, and that the important feature of the undertaking would be the establishing a direct communication between the metropolis and Plymouth and Falmouth, and thus to form an immediate transit to the extreme part of the West of England.

That the Company should join a railway projected to cross the Thames, and thus effect an immediate connexion with a central terminus at Hungerford Bridge. That from the London terminus the line would branch off through certain places therein mentioned to Exeter.

The prospectus, after stating some proposed junctions with other projected lines, and the different towns through which the railway was intended to pass, and setting forth the great advantages likely to result therefrom, proceeded to state that the rejection of the bill before Parliament of the Plymouth and Falmouth line, induced the committee to

propose an immediate extension of the direct line from Exeter to Falmouth; and that in the allotment of shares for that part of the line, preference would be given to the original owners of shares in the Direct London and Exeter Company and the landowners on the Falmouth line, and that the entire line had been partially surveyed, and the plans, sections, and books of reference would be ready within the term prescribed by the standing orders of Parliament, and application would be made for a bill to incorporate the Company early in the then next session.

That plaintiffs applied for shares, relying on the truth of the statement made in the prospectus, and particularly on the statements that the line had been partially surveyed, and that the plans, sections, and books of reference would be ready within the time prescribed by the standing orders of Parliament for the purpose of applying for a bill, and also relying on the benefit to be derived from a direct line of communication between London and Exeter.

That the committee of management of the Company took upon themselves the management thereof, and continued in such management, and appointed defendant, E. S. Blundell, honorary secretary of the Company.

That in consequence of the favour with which the scheme was received by the public, the applications for shares from solvent and responsible persons greatly exceeded the number of shares into which the capital of the Company was divided, and the committee of management had full opportunity of making up and completing the full amount of the capital of the Company, by procuring solvent and responsible persons to hold all the shares in the undertaking.

That on the 1st of October, 1845, an advertisement appeared in the Times newspaper, purporting to be by order of the committee of management, and to be signed by the solicitors to the Company, which was as follows:—"Direct London and Exeter Railway, and Extension to Falmouth and Penzance.—No further applications for shares can be

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received in this undertaking. The committee of management are actively engaged in the duties of allotment, but deem it necessary to apprise the public in advance, in order to prevent disappointment, that from the enormous number of persons who have applied for shares, not more than one-tenth of even bonâ fide applications can be entertained."

That on the 15th of the same month of October, a second advertisement appeared, signed by the secretary of the Company, which was as follows:—The Direct London and Exeter Railway.—The managing committee of this Company hereby give notice that the allotment of shares is completed, and that the letters will be issued to the public, if possible, this day, October 13th, 1845."

On the 17th of the same month a third advertisement appeared, which was as follows:—"The Direct London and Exeter Railway, with Extensions to Falmouth and Penzance.—The committee of management hereby give notice that they have completed the allotment of shares, and that the usual letters of allotment are this day issued. In the arduous duty of deciding on claims unprecedented, it is believed, in their number and respectability, the committee have been obliged to give a preference to applicants locally interested or likely to bring to bear for the Company a large share of legitimate influence. The numerous persons with undoubted claims on the score of wealth and social standing, whose applications have either been passed over or cut down, are requested to accept this reason as the committee's apology. The committee desire to add, that while attestations of public support are daily reaching them from the most influential quarters, the engineering preparations under Mr. B. are so advanced that the project cannot fail to be placed before Parliament in a manner the most satisfactory to the shareholders."

That a few days after the last advertisement, plaintiffs severally received letters of allotment, which were duly

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issued by the committee of management of the Company, and signed by the secretary, for twenty-five shares, and the letter of allotment received by plaintiff, R. Chatfield, was for forty shares, and that such several letters of allotment were, *mutatis mutandis*, in the same words and figures as the letters of allotment received by plaintiff, R. C. Bell, which was as follows:—"Not transferable. The Direct London and Exeter Railway Company, with Extension to Falmouth and Penzance. Provisionally registered. Capital, £3,000,000, in 120,000 shares of £25 each. Deposit, 1*l.* 7*s.* 6*d.* per share. No. of letter, . Deposit, 34*l.* 7*s.* 6*d.* No. of shares, 25. 6, Great Winchester-street, Broad-street, London. 11th October, 1845. Sir,—The committee have at your request allotted to you twenty-five shares of £25 each in this undertaking, upon the consideration that the deposit of 1*l.* 7*s.* 6*d.* per share thereon be paid on or before Saturday, the 18th day of October instant, in default of which this allotment will be forfeited, and the shares disposed of to other applicants. The bankers will give a receipt for the deposit in exchange for this letter, which must be left with them. I beg also to inform you, scrip for the shares will be delivered to you in exchange for the bankers' receipt upon your executing the parliamentary contract and subscribers' agreement, of which due notice will be given. Be pleased to observe that the bankers' receipt must be produced when you attend to execute the deeds." And such letter contained also the names of the bankers authorised to receive deposits on behalf of the Company.

That plaintiffs duly paid the deposits and received the bankers' receipts for the shares, and executed and subscribed the parliamentary contract and subscribers' agreement. The parliamentary contract, amongst other things, declared that the several persons of the first part had respectively subscribed for the purpose of making and establishing a railway, commencing at or near Knightsbridge or Brompton, and ter-

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minating in or near to the city of Exeter, with an extension to Falmouth and Penzance, together with branch railways; and it conferred on the provisional committee (thereby appointed) the usual powers to add to their number, to remove and appoint directors, and to pay expenses, &c.

That some time after plaintiffs had received their letters of allotment, they were informed for the first time that the directors who had been originally appointed had come to a resolution to give up the extension line, and the Company was again registered under the original name of "The Direct London and Exeter Railway."

That on the 15th of December, 1845, a general meeting of the shareholders of the Company was duly convened pursuant to advertisement, at which a report was read which had been previously agreed upon and settled by the provisional directors, which stated, among other things, that, as evidence that the project had been most favourably received by the public, 400,000 applications for shares had been made, when there were only 120,000 shares; that no allotments were issued until the middle of October, when an allotment committee was constituted, and they issued only 58,000 shares; that, in consequence of the panic, out of the 58,000 shares allotted, the deposits on 35,460 remained unpaid.

That resolutions were passed at the said meeting to the effect that the shareholders had every confidence in the merits of the line, and determined to proceed in its support; that S. B. C., J. P., and J. D. C. be requested to form a committee of management, with power to add to their number; that the committee be authorised to issue shares to the extent required for the deposit in Parliament, upon this condition, that, if the necessary amount be not subscribed for by such deposits, the whole sum so raised be returned without deduction; that whatever steps could be taken without any expense beyond the money in hand, towards placing the project before Parliament, be so taken; that the committee

prepare a statement of the accounts of the Company, and that a copy thereof be given to every shareholder.

That at the meeting plaintiffs first discovered that the original committee of management, instead of attending generally to the affairs of the Company, had left the whole of such management in the hands of the secretary and eight of the committee, who had formed themselves into the allotment committee, and afterwards, with the exception of one, into the finance committee, and had taken upon themselves the entire control and management of the Company and the allotment of shares. And also that for some time before proceeding to settle the allotment of shares to the public, and with a view to ascertain what ought to have been the allotments, a circular letter was sent by the secretary of the Company to each member of the provisional committee, stating that the committee of management had set aside 150 shares for each of them, and requesting to be informed before the 10th of October, whether, as one of that body, he would accept the same.

That several members of the provisional committee, and particularly defendants, sent answers to such circular, signed by them, accepting 150 shares each, and requesting that such number of shares might be set aside for them, and the same were accordingly duly set aside and allotted to them.

That although all the other members of the provisional committee who so agreed to accept shares, and plaintiffs and the other shareholders of the Company (except the secretary and T. P. H.), had taken up their shares and paid the deposits, twenty-nine of the defendants (*nominatim*, including A. Capel and J. Allen) had never taken up their shares or paid the deposits thereon, and then refused so to do.

That the defendants forming the allotment committee, acting with the sanction of the committee of management, and without the knowledge or sanction of the other members of the provisional committee, took upon themselves to

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reserve more than one-half the shares of the Company, and refused to allot the same; and that such number of shares have consequently never been allotted, and are now in the hands of the defendants or other the provisional directors of the Company.

That plaintiffs discovered that some time before the allotment of shares took place, and in September, 1845, the then managing committee of the Company entered into an agreement with D. E. C. and W. A., whereby they agreed to set apart 1000 shares in the Company on which the deposits were to be considered as paid, as a remuneration to them for their services as promoters of the railway; and also that, instead of making good the number of shares so agreed to be set apart out of the shares which had been reserved without the knowledge of the rest of the provisional committee, they laid out and expended out of the funds of the Company a large sum of money (1794*l.* 1*s.* 3*d.*) in the purchase of shares in the market for the purpose of making up such amount, which sum has never been made good to the Company; and that the managing committee had in like manner drawn out from the monies of the Company £5000, which had been expended by them in making payments by no means justified, and, amongst others, had permitted E. S. B. (the secretary) to retain, besides £374, in respect of which he had not given any account, a sum of £500, £400 of which had been allowed by the managing committee as a remuneration for his alleged services for a period less than two months.

That not only were the plans and sections of the proposed railway omitted to be deposited, but were also incomplete, and would have been utterly useless in case the scheme had been prosecuted.

That, under these circumstances, and the defendants not having paid their deposits, it became impossible to pay the amount required by the standing orders, and the objects of the Company had consequently failed.

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That, unless the other defendants were compelled to pay up their deposits, the assets of the Company would be insufficient to meet the liabilities, and that plaintiffs and several other shareholders would be liable, and in danger of being sued.

That it was utterly impossible to dispose of the remaining shares.

That the defendants Sir J. P. B. C., J. D. C., and R. J. P., when appointed provisional directors, had endeavoured to enter into a complete investigation of the accounts and previous management of the Company, but that the defendants had met with every opposition from the other members of the committee, and particularly the secretary, with the sanction of the other members of the provisional committee, had refused to deliver up the minutes and cash-book and other accounts of the Company, or to join with any of the other of the provisional directors in signing cheques necessary for payments of the several debts or claims due from the Company; and that, under the circumstances, the three above-named defendants had declined to act as provisional directors of the Company; and that there were, therefore, no persons duly qualified to act, or who would agree to act as directors; and that several persons had already commenced actions against shareholders in respect of claims and demands alleged to be due to them in respect of business done or goods supplied by the order of the former managing committee or directors, and that plaintiffs had discovered that several of such claims and demands were highly overcharged; and that in case the same were carefully investigated, they could be reduced, but that there was no person to investigate the same; and that quarrels and dissensions had arisen among the defendants, and that two of the directors had been discharged, and three others, Sir J. P. B. C., J. D. C., and R. J. P., had been appointed in their place, but that the other provisional committee-men had refused to act with them.

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That twenty-eight of the original members of the provisional committee never having signed the Parliamentary contract or subscribers' agreement, or any other deed or covenant binding them to take shares in the Company, it was impossible to enforce the payment of the deposits.

And the bill charged that in case the defendants (including the demurring defendants who had not paid the deposits) had not been registered as shareholders in the Company, each and every of them had consented to become and had accepted the office of a member of the provisional committee, and had assisted in the formation of the Company; and that it was upon the faith of their or many of them having joined in such provisional committee that the project was formed, and plaintiffs and the other shareholders of the Company consented to take shares therein, and paid the deposits upon such shares.

That as such members of the provisional committee, the last-named defendants were bound to take up and pay their deposits on the several shares set apart for them in the capital of the Company.

That the committee of management at the time of the transaction were guilty of a gross breach of trust in permitting the sum of £1794 to be paid out of the assets of the Company for the purpose of purchasing shares for D. E. C. and W. A., and were, in like manner, guilty of a gross breach of trust in paying, or permitting the sum of £5000 to be paid to the financial committee.

That the secretary ought to refund the £400 paid to him, and set forth an account of all monies paid and received by him.

That the partnership property was considerable, and, if collected, would pay a considerable dividend.

That the number of shareholders of the Company was so great, and the rights and liabilities of such shareholders were so subject to change and fluctuation by death or otherwise, that it would not be possible, without the great-

est inconvenience, to make them parties to the suit; and so to do would, in fact, render it impossible to prosecute the suit to a hearing.

That all the shareholders of the Company had a common interest in having the partnership property and assets duly got in, and applied by the Court in satisfaction of the partnership debts.

The bill prayed an account of the several dealings and transactions of the members [*nominatim*] of the managing committee during the time they respectively acted, and that in taking such accounts the last-named defendants might be charged with and decreed to make good to the Company all loss and damage which might have been incurred by the Company, in consequence of their having neglected to allot the several shares in the Company which were retained by them at the time when the allotment of shares took place, and in consequence of any misapplication of the funds which they might have sanctioned on the part of the finance committee, including the purchase of the 1500 shares for D. E. C., and of 1000 shares for W. A., and the withdrawal of the sum of £5000 from the bankers of the Company; and that the defendant, the secretary, must be decreed to refund and make good the sum of £400 paid to or retained by him, together with all monies for which he had not duly accounted; and that an account might be taken of all the property and assets of the Company, including therein the several amounts then due from the defendants [*nominatim*, including C. and A.] in respect of the deposits on their respective shares so remaining unpaid. And the bill also prayed for a receiver and injunction, and also an account of the debts and liabilities due from the Company, or to which the Company was subject, and that the property and assets of the Company, including the aforesaid deposits, might be applied for that purpose.

To this bill, two of the defendants [A. C. and J. A.,

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members of the provisional committee, to each of whom 150 shares had been allotted, but who had not paid up their deposits or been registered as shareholders] put in a demurrer generally for want of equity, and also for want of parties, inasmuch as D. E. C. and W. A. (the promoters of the Company) and M. H. and W. K. (the trustees of the subscription contract), and divers persons who had acted as members of the provisional committee, and also divers persons who were shareholders and partners in the joint-stock company, had not been made parties.

Mr. *J. Parker* and Mr. *Daniel*, in support of the demurrer.—Unless a case of partnership is established by this bill, the demurrer must be allowed, for on this depends the whole equity of the plaintiffs' bill; and in order to establish a partnership, it must be shewn that there existed a joint liability for losses, or a community of interest. Now the demurring defendants had never accepted the shares offered to them, nor signed the parliamentary contract, nor in any manner acted in the affairs of the Company so as to render themselves competent to receive the profits or to make themselves liable for losses. The committee of management had no power, after the acts of misfeasance charged in the bill, to enforce a contract for shares, if any such existed; much less can the shareholders, who rest their case on the same acts, compel these defendants to take a share with them of the liabilities which they endeavour to repudiate by the allegations in their bill. The defendants A. and C. refuse to accept shares, or to sign the parliamentary deed, and therefore disclaim all right to any profits, and they are freed from all liability to creditors by the acts of the managing committee: *Fox* v. *Clifton*(*a*), *Pitchford* v. *Davis*(*b*). The plaintiffs' only remedy was at law against the managing committee: *Nockells* v. *Crosby* (*c*), *Walstab* v. *Spottis-*

(*a*) 6 Bing. 776. (*b*) 5 M. & W. 2. (*c*) 3 B. & C. 814.

woode (*a*). The plaintiffs were not even liable for the expenses incurred in setting the concern a-going, unless it can be shewn that they have personally authorised them. The bare fact of the defendants A. and C. being named as committee-men does not render them personally liable even to creditors (*b*). Although there were statements and allegations of the existence of a partnership between the plaintiffs and defendants, yet, in the argument of the demurrer, they cannot be taken as admitted, being in fact a wrong legal conclusion drawn from the circumstances stated in the bill. The plaintiffs have no right, suing on behalf of the other shareholders, to waive their legal remedies and ask for relief out of the assets, unless an allegation is contained in the bill that the others consent to do so: *Green* v. *Barrett* (*c*). The plaintiffs have mistaken their remedy, and the persons who ought to be sued are not the demurring defendants, but the directors whom they accuse of mismanagement.

Mr. *Stuart* and Mr. *Hetherington*, in support of the bill. —The bill in this case has been framed in accordance with the case of *Wallworth* v. *Holt* (*d*). The defendants, by their acts, must be taken to be members of a partnership, and to be jointly liable for the losses which have occurred. All the provisional committee had certain shares allotted to them, and, by accepting them, they became shareholders and not mere allottees, although they did not sign the parliamentary deed (*e*). By the offer and acceptance of the scrip a contract was created, which rendered the demurring defendants liable to pay the deposits, and to join in the liabilities of the partnership; but, independently of the liability to pay the de-

(*a*) Ante, Vol. 4, p. 321.
(*b*) See *Reynell* v. *Hopkins*, ante, Vol. 4, p. 351.
(*c*) 1 Sim. 45.
(*d*) 4 My. & Cr. 619.
(*e*) See *Clements* v. *Todd*, antè, p. 132.

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posits, the defendants A. and C. rendered themselves partners in the concern, by permitting their names to appear on the list of the committee, and holding themselves out to the world as members of that committee, and on the faith of this the plaintiffs have taken shares. All the members of the provisional committee are bound to contribute, and the managing committee are bound to account; and the demurring defendants are necessary parties to this account. This is part of the relief sought by the bill, and is sufficient to sustain it against the general demurrer.

Mr. *J. Parker* replied.

The VICE-CHANCELLOR.—The demurrer before me is a demurrer of two gentlemen, Messrs. Capel and Allen, and, it appears to me, that, if they were to be considered as shareholders, who, in that character, had made themselves accessory to the many acts of misfeasance stated in different parts of this bill, there might be some ground for overruling the demurrer; but the question really is, whether any sufficient case is stated in the bill to enable the Court to hold Messrs. C. and A. responsible. The language of the bill, as regards the demurring parties, appears to be purposely obscure and ambiguous; but it results, I think, upon a comparison of all the passages, to this,—that letters are written to them, and to other persons, proposing to them to take shares, to which they sent answers agreeing to accept shares; but by the term "accept," taking was excluded, as it is expressly averred that they never had taken any shares. How anything can be due from a party to the Company before he becomes a shareholder I cannot understand.

[His Honor then read over the different passages in the bill relating to the demurring parties, and also the charge "That in case several parties, including C. and A., or any of them, had not been registered as shareholders in the

Company, each severally of the said last-named defendants consented to become, and accepted the office of a member of the provisional committee of the Company, and that they assisted in the formation of the Company, and that it was upon the faith of their *or many of them* having joined in such provisional committee, that the project was formed, and that the plaintiff and the other shareholders of the Company consented to take shares therein, and paid their deposits upon such shares."]

The *Vice-Chancellor* then proceeded as follows:— Now it is very remarkable that this seems to represent that the demurring parties, by holding out something as an inducement upon which the plaintiffs consented to take shares, became bound and implicated in the affairs of the Company, but there is no distinct allegation, nor can I find one in any part of the bill about what time they actually agreed to take the shares. The plaintiffs took their shares on the 6th October, and it is stated that the letter was written on the 15th, but when the answer was written, or if anything else was done independently of the answer, we do not know. With respect to the passage which I have read, the expression "their or many of them" appears to me to qualify, or nullify it; for, according to the statement, although it may be true that the plaintiffs did join and become implicated in the affairs of the Company, it might have been upon the faith of others, and not merely the demurring parties having joined the Company. It appears to me, upon the whole, that there is no case stated which can in the least give the plaintiffs an equity against Capel and Allen; and my opinion is, therefore, that the demurrer ought to be allowed upon the usual terms.

From this judgment the plaintiffs appealed, and the case was argued by the same counsel as in the Court below. The demurrer, for want of parties, was also relied on, but no decision having been given on it, the argument is omitted.

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Mr. *Stuart*, in reply, relied on those passages in the bill which he contended must be admitted in the argument of the demurrer, wherein it was stated that the scheme of the Company could not be carried on unless the defendants paid up their deposits; on which

The LORD CHANCELLOR said:—It is contended, on the part of the defendants, that if they had paid those deposits they would, under the circumstances stated in the bill, have been able to recover them back. Can this Court make them contribute what a court of law would enable them to recover? *Walstab* v. *Spottiswoode* (*a*) lays it down, that where there has been misconduct on the part of the managing directors, the shareholders can recover back their deposits. If you dispute that proposition, you must shew some authority contrary to that decision. This is a case wherein the scheme has failed; and the plaintiffs, instead of going against those who had occasioned it, call on other persons to contribute to make up their loss. This is an important case, being the first in which this Court has been called upon to act with reference to the decision of courts of law on these points, but cases must be decided according to the exigencies of mankind as they arise; it can never be that rights are construed differently in the courts of law and in these courts, and I must look into the cases to which I have been referred (*b*).

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On this day, the LORD CHANCELLOR, after referring to the facts stated in the bill, delivered his judgment as follows:—

I must observe, that this bill does not ask for any direction for payment against the demurring defendants, but merely for a receiver; and although it is alleged that the plaintiffs were induced to take shares on the faith of the

(*a*) Ante, Vol. 4, p. 321. (*b*) See *Dawson* v. *Morrison*, ante, p. 62.

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defendants having joined in and become members of the provisional committee, yet no relief is sought against them on the ground of that alleged misrepresentation, which would not have been equally applicable if such misrepresentation had not been charged to have existed.

On the demurrer, three questions arise; first, did the bill shew any liability on the part of the demurring defendants? secondly, did it shew a right in the plaintiffs to sue these defendants? and, thirdly, did the relief prayed by the bill render these defendants necessary parties? I am against the plaintiffs on all these points. The defendants have not entered into any contract to pay the deposits on the shares allotted to them,—the plaintiffs have not shewn any right in themselves to sue these defendants,—and as the bill is framed it does not appear to me that they are necessary parties. The case made against them would have been equally applicable to any debtor of the concern, and I do not think that the bill has made a case shewing any equity against the demurring defendants.

The demurrer must therefore be allowed, and the appeal be dismissed, with costs.

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SKERRATT *v.* The NORTH STAFFORDSHIRE RAILWAY COMPANY, and *Re* the Arbitration of the NORTH STAFFORDSHIRE RAILWAY COMPANY and J. SKERRATT, under the North Staffordshire Railway Act, 1846, and the Lands Clauses' Consolidation Act.

The owner of a mansion-house and lands entered into an agreement with the promoters of a projected company, whereby it was stipulated that the value of the land to be taken and of residential and other damage should be referred to arbitration, and "all proper communications, archways, drains, &c., made in such places and in such mode as might be decided by the arbitrators, and the reference was to be subject to the powers of the Railways, Lands, and Companies' Clauses Consolidation Acts. These heads of agreement were afterwards reduced into a formal document, and signed by the solicitors of the Company. The Company afterwards proceeded to give notices under the usual forms prescribed by the acts, requiring the plaintiff to submit his claims, but the plaintiff disregarded such notices.

THE plaintiff in this suit was possessed of a mansion-house in the county of Chester, and of about thirty acres of land and grounds surrounding it, part of which land produced brick clay, which was represented as worth £500 per acre.

In 1846, a certain railway, from Harecastle to join the Manchester and Birmingham Railway near Sandbach, was projected, and the plaintiff petitioned against the bill in Parliament, and thereupon divers treaties and negotiations verbally and in writing took place between the plaintiff and the solicitors and agents of the Company, and heads of an agreement were drawn up by the plaintiff's agent, which

On the 23rd of February the Company appointed their arbitrator, and on the 9th of March the plaintiff also appointed his arbitrator. On the 29th of March the two arbitrators appointed an umpire, who made his award on the 28th of June, wherein no mention was made of the communications, &c. The Company, having paid the amount into the bank, proceeded to enter upon the land, when the plaintiff filed his bill, and obtained an ex parte injunction, and at the same time moved to set aside the award, on the grounds—first, that the award was not made within the time limited by the 23rd section of 8 Vict. c. 18 (*a*); and, secondly, that it did not include all the matters submitted to arbitration.

Held, by the Lord Chancellor, overruling the judgment of *Wigram*, V. C., that the time mentioned in the act means, in the case of an umpire being appointed, three months from the date of such appointment, and not three months from the date of the appointment of the arbitrators.

That, reference being made in the agreement to the Railway Clauses' Consolidation Act, the umpire was not bound to include in his award matters which are specially provided for by that act.

(*a*) The words of this section are as follow:—"If, when the matter shall have been referred to arbitration, the arbitrators or their umpire shall *for three months* have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury as hereinafter provided."

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were as follow:—"The promoters and petitioner agree to refer the question as to the value of the land to be taken, and of residential and other damage to be occasioned by the Railway, to arbitration in the usual way. The centre line is not to be deviated in Moor field so as to approach nearer to the mansion. A tunnel to be made and covered over with turf through so much of the line as runs through Moor field. The Company to pay the costs of the petition up to this day, not exceeding £50. All proper communications, archways, drains, gates, &c. to be made in such places and in such mode as may be decided by the arbitrators. The reference to be subject to the powers of the Railways, Lands, and Companies' Clauses Consolidation Acts.—London, 12th June, 1846."

The memorandum was signed by the agent of the promoters of the Company, and the plaintiff then withdrew his opposition to the bill in Parliament, and the same passed into an act, and the promoters were incorporated under the title of "The North Staffordshire Railway Company," with all the rights, privileges, and liabilities of the Company originally projected.

A formal agreement was afterwards drawn up, and the draft was submitted by the plaintiff's solicitor to the solicitors of the Company, who altered it in red ink, and subscribed their approval and signatures thereto.

On the 12th of February, 1847, the Company served the plaintiff with the usual formal notice that they intended to take the lands mentioned in the schedule thereunder written for the purposes of their railway, and offering to treat for the purchase, but the plaintiff did not make out or send in any claims.

On the 23rd of February, the Railway Company duly made and signed a certificate of appointment of arbitrators, which, after referring to the lands required by the Company, and their notice to the plaintiff, was as follows:—"And whereas by an agreement in writing, bearing date the 12th of June, 1846, and made between the said Company and the said

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James Skerratt, the question as to the value of lands to be taken, and of residential and other damage to be occasioned by the said Railway, was agreed to be referred to arbitration, and that the reference should be subject to the powers of the Railways, Lands Clauses, and Companies' Clauses Consolidation Acts. Now the said North Staffordshire Railway Company hereby under the hand of me, the undersigned J. S., secretary to the said Company, nominate and appoint Thomas Hampson, of &c., arbitrator, to whom shall be referred the question as to the value of land to be taken from, and of residential and other damage to be occasioned by the said Railway to the said James Skerratt as aforesaid."

On the 9th of March following, the plaintiff duly made and signed a certificate of appointment of arbitrators as follows:—"Pursuant to an agreement between the said Railway Company and me, the undersigned, bearing date the 12th of June, 1846, whereby the question as to the value of land to be taken, and of residential and other damage to be occasioned by the said Railway, was agreed to be referred to arbitration, I do hereby appoint J. Woolf, of &c., to be arbitrator in the said matters and things on my behalf."

The arbitrators having duly made the declaration required by the statute, on the 29th of March appointed J. Ashworth as umpire between them, who duly made the required declaration.

The plaintiff attended two meetings of the arbitrators and umpire, and laid before them his claims, and on the 4th of June produced and examined his witnesses.

On the 28th of June, 1847, the said umpire made his award, whereby he awarded that 547*l.* 11*s.* 6*d.*, and no more, was the value and should be paid by the Railway Company for the purchase of the fee-simple of the lands required by the Company, and £80 more as or by way of compensation for the residential and other damage to be occasioned by the Railway, and £108 as costs.

The plaintiff being dissatisfied with the award, and desi-

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rous of impeaching it, on the 10th of September made the submission a rule of court. The Company, being in possession of the award, claimed a right to take the plaintiff's land, and, after a correspondence with him, proceeded in the same month of September to take possession of his land, whereupon the plaintiff filed his bill, praying that the agreement of the 12th of June, 1846, and the formal agreement prepared in pursuance of it, might be declared to be binding on the North Staffordshire Railway Company, and that the two agreements might be specifically performed and carried into execution under the direction and decree of the Court, and that in the meantime the North Staffordshire Railway Company, their agents, surveyors, servants, and workmen, might be restrained by the order and injunction of the Court from entering upon or taking possession of the pieces or parcels of land, or of the estate or premises of the plaintiff, or any part or parts thereof comprised in the said agreements, or either of them, or therein mentioned or referred to, and might also be restrained from continuing in such possession or using the lands, or any of them, or any part thereof, and from digging up, taking away, or removing the clay or soil of the said lands, or any part or parts thereof, and that the North Staffordshire Railway Company might be enjoined to restore possession of the said estates and premises to the plaintiff, and, if necessary, that Mr. Ashworth's award of the 28th of June, 1847, might be set aside and declared void, and as of none effect.

On the 16th of September the plaintiff obtained an ex parte injunction in the terms of the prayer of the bill.

[The grounds upon which the plaintiff insisted that the award was invalid were set forth in the bill, and are sufficiently referred to by the Vice-Chancellor in his judgment, in which the proceedings of the several parties before his Honor in vacation are also fully stated.]

The VICE-CHANCELLOR.—[After stating the facts of the case as hereinbefore set forth, proceeded as follows:—]

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On the 16th of September, 1847, an application was made to me for an ex parte injunction. The case was put both upon the invalidity of the award and the non-payment of the purchase-money, which was verified by the affidavits, and the agreement was, that, until the purchase-money was paid, the possession of the Company was wrongful, whether the award was valid or not; and upon that occasion I put it to the plaintiff's counsel whether, unless the award was avoided in a proceeding under the statute, I could grant his motion upon any other ground than the non-payment of the purchase-money. The answer given to this suggestion was, that the submission had, on the 10th of September, been made a rule of Court, and that a motion was about to be made to impeach the award, and finally, upon the allegation, and supported by evidence, that the purchase-money was unpaid, I granted the injunction in terms sufficiently large to prevent the conversion of the plaintiff's land until the Company should appear, putting the plaintiff upon terms to appear upon any motion the defendants might give to dissolve, on having one clear day's notice of such motion.

On the 23rd of September, 1847, the parties again appeared before me upon the plaintiff's motion to set aside the award. The defendants' counsel alleged that he was prepared to shew by evidence that the injunction had been obtained upon a false suggestion as to the non-payment of the purchase-money, for that the purchase-money had been paid; but there being no motion before me to dissolve the injunction, and the defendants declining to waive the objection arising from the want of such motion, I ordered the motion to set aside the award to stand over, in order that the Company might give notice of a motion to dissolve the injunction; and I directed that the two motions should come on together, with the intent that I might then have the whole case before me. In the same month of September, the case was again brought before me, on a motion by the plaintiff to set aside the award, and a cross-motion by the

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defendants to dissolve the injunction, and was argued on the 28th and 29th of September.

Now, excluding for the present the motion to set aside the award, the payment of the purchase-money relied upon by the defendants was a payment not to the plaintiff but a payment into the Bank of England, under the late act of Parliament, providing in what way payment should be made during the vacation, upon the ground that the plaintiff had neglected or refused to make out his title under the terms of the act. The plaintiff alleged, and it was not disputed, that he had no notice of this payment at the time the injunction was obtained, nor until he was informed thereof by the defendants' motion to dissolve the injunction, and two points were made by the plaintiff—first, that the case was not within the clause of the act which authorised the payment into the Bank of England during the vacation; and secondly, if that point were decided against him, that the defendants' evidence was not technically sufficient to prove the fact of such payment. As the effect of the plaintiff's success upon the above grounds would not have been to decide but only to postpone the decision of the real question between the parties, I suggested, at the close of a very full argument, and the suggestion was finally acceded to by the counsel and solicitors present on both sides, that I should hear the motion to set aside the award, and "that the order to be made upon the two motions should depend upon the motion to set aside the award, waiving all other objections." I have gone into these details for the purpose of explaining how the case got into its present position, and to clear the way to the decision that I am about to pronounce in this cause.

The case was then argued upon the motion to set aside the award, and the plaintiff's counsel admitted, without discussion, that he could not ask me in this case to set aside the award merely by a decree in equity, referring me to the case of *Swinnerton* v. *Hemming* (*a*), lately decided by the *Lord Chancellor*, and that the award could only be im-

(*a*) Not reported.

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peached by the collateral proceedings then before me. The position, therefore, of the case technically considered, after the argument, (that is now and in consequence of my not being prepared to give judgment immediately), was this, that the questions upon which the validity of the award depended had been argued before a court of exclusive jurisdiction, and the judge of that court had reserved his judgment, and the question was, whether, until that judgment was given, I should protect the plaintiff's land or not. The case of a suit to recall probate, though not, perhaps, in all respects analogous to the present, will sufficiently explain my meaning. In the result, I directed the Company not to convert the plaintiff's land until the judgment upon the motion should be given. On the 8th of October last, the defendants again came before me on a motion, the object of which, in effect, was, that upon making a deposit of money in the Bank of England, or giving security for the payment to the plaintiff of what should ultimately be found to be due to him, the injunction should be dissolved, and accordingly, after argument, I made an order to that effect, describing the security to be given (the sufficiency of which, I think, will not be successfully challenged) by the Company, and I ordered the Company to pay the costs of that motion. That motion has not been appealed from. Nothing, therefore, now remains of the question hitherto brought before me but that I should state the conclusion I have come to upon the plaintiff's motion to set aside the award.

It will have been observed, that in both the appointments of arbitrators, the purpose for which they are appointed is confined to determining the value of the land to be taken from, and the residential and other damage to be occasioned by the railway to the plaintiff. Now the heads of arrangement of the 12th of June, 1846, which it was the object of their appointments to carry out, and which are referred to in the instruments appointing the arbitrators, contain the following stipulations:—"All proper

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communications, archways, drains, gates, &c., to be made in such places and in such mode as may be decided by the arbitrators; the reference to be subject to the powers of the Railways, Lands, and Companies' Clauses Consolidation Acts." The award then fixes the value of the land and the damages, but is silent as to the communications, archways, drains, gates, &c.; and I agree with the plaintiff's argument, that it is impossible that justice can be done him if this award is to stand, unless it is to be presumed that some new agreement was come to between the parties varying the heads of the arrangement of the 12th of June, 1846, and making it unnecessary that the arbitrators should have decided as to the communications, archways, drains, gates, &c., or that the arbitrators have made their award upon the assumption that the severance of the plaintiff's land is to be absolute, and no communication whatever is to be made between the parts lying on the opposite sides of the railway. But neither of these assumptions is admissible; it is not pretended by the Company that the heads of arrangement were varied by any new agreement, nor that the award was made upon the supposition that the severance of the plaintiff's land was to be absolute. On the contrary, the proceedings before the arbitrators and umpire negative both presumptions and the evidence, and more particularly the acts of the Company after the award. I refer particularly to the correspondence shewing conclusively that the Company were as much surprised as was the plaintiff, when he found the award was silent as to the above particulars. I say that justice cannot, in these circumstances, be done to the plaintiff, if the award is to stand, because it is impossible that the damages can have been properly assessed independently of the communications and drains for which the award does not provide; and it is impossible that the plaintiff can now be secure of obtaining—if he had the means of obtaining—the communications and drains with reference to which the award, if a just one, must have been made. The question then is, can the Com-

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pany insist on retaining the benefit of the award, not giving the plaintiff, as of right, any such communications or drains, as, according to the heads of arrangement of the 12th of June, 1846, the arbitrators or the umpire should have given him?

I certainly understood, when I looked into this case the other day, that the heads of arrangement had been made a rule of court, and that the difficulty with the arbitrators had arisen from the fact of their appointments being silent as to the communications and drains, and being confined specifically to the value of the land and the damages. This, however, it appears, was not the case; the appointments themselves, and not the arrangements of the 12th of June, 1846, are the subject of the rule of the 10th of September, 1847, and perhaps correctly so; for, on referring to the act of Parliament, the Lands Clauses Consolidation Act, sect. 25, and to which clause, as I before observed, the arrangement was subject, it appears that the appointment of the arbitrators is to be deemed a submission to arbitration on the part of the party by whom the same shall be made. The stipulation, therefore, in the heads of arrangement as to the communications, archways, gates, drains, &c., would be out of the scope of the arbitrators, unless these heads of arrangement are so incorporated into the appointment by the reference they contain to them, as to make it necessary for the arbitrators to take notice of the stipulations they contain; and I am far from being satisfied that such reference has not the effect contended for; for, as the damages were necessarily contingent upon these communications, archways, drains, gates, &c., it was impossible that the arbitrators could assess the damages until the communications, archways, drains, &c., had been decided on. The reference, in substance, and by construction, was to decide upon the damage, regard being had to the communications and drains to be decided on by the arbitrators. The decision of that case was, in terms, upon the question of damages, without the decision of which the

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damages could not be ascertained; and if that be a sound construction of the submission, the award is clearly void at law, because it does not follow the terms of the submission.

It is not necessary that I should give a positive opinion upon the point, whether the award was or not made within the time required by the act. By the 25th section of the act, the appointment of the arbitrator is to be deemed a submission by the party making it. By the 31st section, where more than one arbitrator is appointed, and the arbitrators shall fail to make their award within twenty-one days after the day on which the last of the arbitrators was appointed, or within such extended time, if any, as shall have been appointed by the arbitrators, the matter shall be determined by the umpire; and, by the 23rd section of the act, three months is the extreme time allowed by the act, within which the arbitrators or the umpire are bound to make their award; and these three months must, as I read the act, be computed from the day on which the last arbitrator was appointed, or within such extended time, if any, as should be appointed by the arbitrators. The object of the act was to ensure a speedy decision. The award in this case was not made until the 28th of June, 1847, and was, therefore, too late, if my construction of the act is correct.

It was argued, however, by the Company that the clauses in the Lands Clauses Consolidation Act, to which I have referred, limiting the time within which the award was to be made, did not apply. I cannot, however, accede to that argument. The stipulation in the heads of arrangement were to be subject to the powers of the act. To disregard the limits of time within which those powers were to be exercised, would be to give to the arbitrators appointed in this case different and larger powers than, and not the same as are given by the act, and would defeat the intention of the parties. It was also said that the question of time had been waived by the acts of the plaintiff; and for that argument there is, primâ facie, some

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foundation. In my opinion, the argument is answered by the observation, that, if the submission did not oblige the arbitrators to decide upon the communications, drains, gates, &c., the whole matter has proceeded under a mistake on both sides. It is a fact not disputed, and the proof of their mistake is so conclusive of the acts of the Company themselves, that I cannot hold the plaintiff bound by any waiver of the objection to the award as to time, until it appears he was apprised of the mistake under which the arbitrators acted. If the award is valid, notwithstanding the above objections, as I consider them, (I mean legally valid), I incline to the opinion that it would be voidable on the ground of the mistake of both parties in the terms of the submission. Whether the plaintiff can be relieved against the award on that ground, by a motion to set it aside, is a question upon which I will not give any opinion; but if he cannot, I am strongly inclined to say that this would not be a case within the reasoning of *Hemming* v. *Swinnerton*, in which the arbitrators having done their duty according to the terms of the submission, yet upon the ground of a common mistake in the terms of that submission, a court of equity might, upon its general principle, give relief against the award. I impute no blame to the Company for endeavouring to sustain the award; but I confess the conclusion to which I have come, that the award should be set aside, is satisfactory to myself in this respect, and it is the only conclusion by which justice could be secured to the plaintiff. No order is to be made except to set it aside, because the thing has been arranged, the Company having possession of the land.

From this judgment the defendants, the Railway Company, appealed. On the 8th October, 1847, the Company moved to dissolve the injunction obtained by the plaintiff ex parte on the 16th September, and an order was made by His Honor, dissolving the injunction on the Company paying £1000 into Court, and undertaking to make such

internal and permanent communications between the different parts of the plaintiff's land as the Court should direct.

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Mr. *Stuart* and Mr. *Bovill*, for the Railway Company.

Mr. *Teed* and Mr. *Steere*, for the plaintiff.

Mr. *Steere*, in addition to the arguments urged in the Court below, contended that the award was invalid, in that it professed to have heard evidence by the Company, whereas no evidence whatever had been brought forward by them.

The LORD CHANCELLOR (without hearing Mr. *Stuart* in reply).—I think Mr. *Teed* took an accurate view of this case, when he considered that it depended on the construction of certain clauses in the act of Parliament; and, really, there is no ground for attempting to establish anything beyond that question. *Jan. 20th.*

First of all, with regard to this provision about the drains and gateways, it is quite clear that these are totally and entirely distinct things,—that they could not be ascertained at the time; it is impossible that the arbitrators, or the umpire, could have included in the award as to the value of the land to be taken, any decision as to drains, gates, and fences, and those accommodations which could not in their nature be ascertained until after the works had made some progress, and which by the railway act, which refers all those matters to justices, it is clear never were intended to be considered by the parties until after the works had made some progress. The value of the land was in terms referred to arbitration; and it appears that the agreement which had been previously made contained a provision that the same person should give directions as to the fences and other matters of accommodation, which by the Railway Act would otherwise have devolved as a

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duty on the justices. If the two matters are totally distinct and unconnected, of course they could not be included in the same award: and there can be no objection to the award made as to the one which was properly the subject of reference, because it does not contain the other which never could have been included in the award. If, therefore, the parties have any difficulty in carrying out that part of the agreement, it is a matter totally distinct from that which I have now to consider, which is, whether the award of which complaint is made, is impeachable within the statute. That is the only matter I have to consider.

Now, with regard to the statement in the award, that the umpire had heard the evidence on behalf of the Company and of Mr. Skerratt,—"having fully heard and maturely considered the evidence produced by the said Company and the said J. Skerratt,"—it appeared that there was no evidence produced by the Company, but it rested entirely on Mr. Skerratt's own evidence. The allegation is, that he had heard all the evidence which is produced, that is all; and if he had used the word "or" instead of the word "and," which is often a convertible term where the case requires it, it would have been perfectly correct. There may be an irregularity, or at least an inaccuracy of expression, in stating that he had heard evidence produced by the Company and Mr. Skerratt, whereas the Company produced no evidence; but under the act of Parliament there is an express provision that no award is to be set aside for any irregularity in matter of form; it cannot be carried beyond that,—there is nothing in substance in it; it does not occasion any mischief at all whether the word "and" or the word "or" is used; nobody is injured by it, and it is a mere inaccuracy in the use of a term often convertible.

I must say, that, seeing what the inaccuracy amounts to, and it having been proved that no evidence whatever was produced on behalf of the Company, I cannot but regret that a statement was made to me, which state-

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ment is negatived in terms by an affidavit produced in support of the charge, that the umpire had heard evidence produced by the Company, behind the backs of the opposing party, without giving them an opportunity of cross-examining those parties. There is nothing of the sort in the case. Not only is there nothing in the case in support of the allegation, but the very affidavit read in support of it proves directly the reverse. The allegation having been made, I think I am in justice to the umpire bound to state that it is totally devoid of all foundation. There is nothing at all to impeach his conduct from the beginning to the end. As to having some communication,—what communication does not appear,—but it is said the umpire had some communication with the arbitrators, who had entered into a consideration of the subject; it may have been most innocent on his part,—it may have been his duty to have done it, in order to facilitate his coming to a conclusion on it; it is what is repeatedly done by the highest authorities in the land; it is what the courts of common law always do; the common law judges never will grant a new trial without some communication with the learned judge at Nisi Prius, at whose direction the application is made, because they wish to get at all the information they can to enable them to come to a correct conclusion on the subject. If I thought it necessary to communicate with *Vice-Chancellor Wigram* on this case, I should not think I was guilty of any dereliction of my duty, or open to the imputation of examining evidence out of Court on the subject without communicating with the parties. The charge against the umpire is neither more nor less than might be made against any of the courts of common law, or any of the courts of equity. It is quite sufficient for the present purpose to say, that it is totally and entirely without foundation.

Then the question arises as to the construction of the clauses of the act of Parliament; and although I am of

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opinion on the act, looking only on the clauses of the act, that the objection to the award cannot be maintained,—which was the ground on which the Vice-Chancellor mainly decided it, I do not wish it to be assumed that I consider that this agreement necessarily falls, or brings the parties, within the provisions of the act. This is merely an agreement to refer a matter to arbitration, and there is a provision that the powers of the act shall be considered effectual for the purpose of enforcing the award, but there is no provision that the clauses in the act shall regulate the conduct of the parties. What I threw out before has not been answered at all, viz. that, if it was the meaning of the parties, that the parties agreeing should submit to the act of Parliament, as the act of Parliament may be enforced at the option of either party without any such agreement, it is giving the parties precisely the same rights as those to which they are entitled, and imposing upon them the same duties which they are subject to under the act of Parliament; and therefore such an agreement to refer would have been a perfectly idle and nugatory proceeding. If that is so, of course the clauses of the act are applicable to the case, which would be quite conclusive against the ground on which the objection is raised. I do not however give any decisive opinion on that, because I do not think it necessary to do so. I confine myself to that which is absolutely necessary, omitting that which, if I had come to a different conclusion on the construction of the clauses of the act, might have been necessary.

Now the question is, what period was allowed for making the award in a case where the arbitrators do not make their award, and the duty therefore devolves on the umpire? Now the arbitrators are to be appointed, and they are, before they proceed to perform the duties of the arbitration, to appoint an umpire, whose duty it will be to consider the matters of reference if the arbitrators shall not be able to agree. Now it appears, and there is no doubt—for there is a provision in the act—that

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the arbitrators shall make their award within a certain time (*a*): "If, where more than one arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within such extended time (if any) as shall have been appointed for that purpose by both such arbitrators under their hands, the matters referred to them shall be determined by the umpire to be appointed as aforesaid." Now, there is no ambiguity or doubt about that clause at all; twenty-one days is the time allowed for the award. It is quite clear, that, if both arbitrators agree, then they have the power of enlarging the time, but it is not without limit, because in the other clause which has been referred to, the 23rd clause, there is another limitation as to time, which says: "If, when the matter shall have been referred to arbitration, the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury." Now, then, the arbitrators have the power to make their award within twenty-one days, but if they do not do anything before the expiration of the twenty-one days, it devolves on the umpire; they have, however, the power of enlarging the time, and that without limit, except so far as it is limited by the 23rd clause, which refers it to another tribunal if their award is not made within three months, that is to say, if they are in default, or if in the terms of the clause (I am now reading it without reference to the umpire) if the matter shall be referred to arbitration, and the arbitrators shall for three months have failed to make their award, then it is to be settled by a jury. Now the power to enlarge the time for making the award was quite clearly given to them, for any period within the three months

(*a*) 31st sect. 8 Vict. c. 18.

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from the time of their appointment. If, therefore, they choose, without reference to the twenty-one days, to enlarge the time from time to time so as to exhaust the three months, although they had previously appointed an umpire, it is quite clear that when the three months had expired, —and the umpire is bound to make his award before the expiration of three months time,—it is quite clear the umpire would have no time left within which he could perform his duty, which would render the appointment of the umpire perfectly useless, and the object of the parties, in having the umpire to decide between them, would be entirely lost, and the reference to the jury would be a mere matter of course on the expiration of the three months. Now that is an unavoidable result. It was very much considered by the learned counsel, and, as I anticipated, no answer was given, or could be given, that such a result must arise if this be the true construction of these clauses. But, is there any other construction leading to some less absurd conclusion? In my opinion there is another construction which is more or less consistent. It was indeed suggested, that if an umpire was to be appointed to undertake that duty as soon as the arbitrators suffered the time to elapse within which they ought to have made their award, which, in the ordinary course of things, would have been at the expiration of twenty-one days, if they made no award within that period, it devolved on the umpire; if, on the other hand, they were advised to take more time to make their award, then the duty of the umpire should commence from the expiration of that time, and the time should be so enlarged as to give him an opportunity of performing that duty.

The statute supposes that you call in the umpire in order that he may have the opportunity of performing his duty. Now, the way of construing the act and of effecting that object, and of rendering the 23rd clause consistent with all the other provisions of the act, is to give the words their natural and obvious meaning, instead of attempting an

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impossible and absurd construction, by which one arrives at a result which could not possibly have been intended. The 23rd clause is: "If, when the matter shall have been referred to arbitration, the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury." Then *reddendo singula singulis*, according to the ordinary rules of construction, we have two parties making an award, provision is made for the one and the other, whether the arbitrators may have failed or the umpire may have failed, it applies to both in the case of abandonment of their duty and the neglect of doing that which they ought to do within three months, and then the event occurs in which they are to call in the assistance of a jury. How can you possibly construe this to mean that the arbitrators themselves, and they alone, may create the delay and prevent the award being made? How can you construe that as meaning that the umpire shall within the three months make his award? I confess I do not see how, by any possible use of the language found in this clause, such a construction can be put on it. I therefore read it thus—that the arbitrators may have twenty-one days in the first instance; they may enlarge it for themselves to the expiration of the three months. They have no longer time for themselves to do that, but whenever it happens, either at the expiration of the twenty-one days, or the expiration of the enlarged time, that the duty of the umpire commences, then the umpire has three months to perform his duty. That makes it rational enough, and it would not lead to any great delay. The probability is that there would not be a delay of three months: the great probability is, that it would lead only to a delay of twenty-one days, and then the three months; so that the difference in all probability would be a delay of only twenty-one days. At all events, it cannot exceed three months, and it is now clear, on any construction of the agreement, that

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the arbitration being considered as commencing on the 9th of March, if the twenty-one days are allowed to the arbitrators, it carries it to the 30th of March, from which day the duty of the umpire commences. The award was made on the 28th of June, before the expiration of three calendar months from that time. I am, therefore, of opinion that the objections against this award are not well founded.

BEFORE THE MASTER OF THE ROLLS.

Jan. 25th & 26th.

A testator, by codicil, gave all the shares he possessed in a certain railway, and all his right, title, and interest therein, to his son and daughter equally.

At the time of his death the testator had twenty-two £100 railway shares, on each of which calls amounting to £70 had been paid, and the remaining sum of £30 had been advanced by the testator, in his lifetime, under a power contained in the railway act, by which he was entitled to interest until the calls were made:—*Held*, that the legatees were entitled to the shares and dividends, and also to the sums advanced and the interest.

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THE testator in this cause by codicil, dated the 14th of September, 1843, bequeathed to his son, W. H. Tanner, and to his daughter, Sarah Yeatman, all the shares which he then possessed in the Bristol and Exeter Railway, and all his right, title, and interest therein and thereto, to be equally divided between them, share and share alike.

The facts, as stated on the pleadings, were, that the testator was possessed of twenty-two £100 shares in the Bristol and Exeter Railway, on each of which calls amounting to £70 had been duly paid by him, and in respect of which dividends had become due. That, under a power contained in the Bristol and Exeter Railway Act, the testator had also in his lifetime paid in advance the remaining sum of £30 on each share (amounting, in the whole, to £660), and according to the provisions of that act, he was entitled to receive interest at £5 per cent. on the sum advanced until the calls were made.

The bill was filed by W. H. Tanner, one of the legatees of the shares, praying that eleven of such shares might be transferred to him, together with the dividends thereon, and also the interest which had accrued due since the

testator's decease on the sums paid by him in advance during his lifetime.

Mr. *Kindersley* and Mr. *Selwyn*, for the plaintiffs, contended, that the payment of £30 per share before any calls were made was similar to the case of a landowner, who had compounded for any contingent outgoings to which his estate would be liable, and paid the composition in his lifetime. It could hardly be contended, that, in such a case, the devisee of the land was to repay to the testator's estate all such sums as he would have been liable to pay for outgoings, if the testator had not entered into a composition in respect of them. In *Blount* v. *Hipkins* (*a*) and *Jacques* v. *Chambers* (*b*), the testator's estate was held liable for the calls to be made after the testator's decease in respect of the shares bequeathed; and the present case is entirely similar to those, except as to the interest on the sums advanced. No doubt the testator had the power of disposing of the interest until the calls were made; but not having done so, the conclusion to be drawn was, that the testator intended the interest to go with the capital. If he had sold the shares with the full amount paid up, the interest would have gone to the purchaser.

Mr. *Turner* and Mr. *Dickinson*, for the executors.—The money advanced was in the nature of a loan to the Company, until the calls were made; and the interest payable on the sums so advanced was paid by cheques, in a manner quite distinct from the dividends on the shares. Separate accounts were kept. No purchaser of the shares in the market would have been entitled to the sums so advanced, unless they had been particularly mentioned in the contract. At all events, the interest ought not to be confounded with the dividends payable on the shares; and as

(*a*) 7 Sim. 51. (*b*) Ante, Vol. 4, p. 499.

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the testator had only bequeathed *shares*, he did not intend to pass the interest on money.

Mr. *Kindersley* replied.

The MASTER OF THE ROLLS, after stating the facts, said: I observe that the act of Parliament by which the railway was established, contains an express authority for the directors to receive money in advance on their shares from the shareholders. In respect to payments made by the testator in obedience to calls, he was entitled to receive the dividends with the rest of the shareholders; but as to the anticipated payments, the testator, by agreement with the Company, was entitled to receive interest. The testator had paid out and out the whole sum of £100 on each of his shares, consisting of £70 and £30 (being £100 shares), and he received income from the two distinct portions, part of which was interest on the £30, and the other part dividend, payable in respect of the shares generally, upon which calls amounting to £70 only had been paid. The testator had, at his own will and pleasure, paid the £660 (*i. e.* £30 on each share), and received dividends only on what he had been compelled to pay, and interest in respect of the residue. Full consideration was given him in respect of his payments; and, in my opinion, the words of the bequest of all the testator's right, title, and interest in and to the shares in question, passed the absolute title in the twenty-two shares, inclusive of the interest on the anticipated payments, to the legatees. I will again refer to the act of Parliament, and give my judgment to-morrow.

June 26th. I have looked over the act of Parliament, and am confirmed in the opinion I expressed yesterday. I have attended to the arguments urged as to the personal representatives being entitled to the interest on the portion volun-

tarily paid; but I think it belonged to the legatee as incident to, and going with, the shares; for if, under any accidental circumstances, there might not be occasion to make all the calls, if the interest were now paid over to the executors, there would be an over-payment which would have to be returned to the owner of the shares. I am, therefore, of opinion that the words of the codicil are sufficient to pass the whole to the legatee.

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BEFORE VICE-CHANCELLOR WIGRAM AND THE LORD CHANCELLOR.

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COTHER *v.* The MIDLAND RAILWAY COMPANY.

A Railway Company were empowered by their act, with which the Consolidated Acts were incorporated, to make and maintain "the railway and works" on the line, and in the manner thereby provided. The Company proceeded to take, under their compulsory powers, the whole of a strip of land numbered in their plans, part of which was more than 100 yards distant from the lines intended to be laid down, alleging that it was required, not only for these lines, but also for the general purposes of the traffic:—*Held*, by the Lord Chancellor, dissolving an injunction granted by his Honor Vice-Chancellor *Wigram*, that, under the powers of the act, the Company were authorised to take the whole of such land for the general purposes of their act, although a small portion only was required for the lines of rail.

That, in cases where the question is, whether parties are or are not exceeding their powers, the injunction should not merely prohibit them generally from doing what they have no authority to do, but should define the limits of the authority within which they are authorised to act.

THE bill in this suit was filed on the 8th of October, by W. Cother and the other trustees of St. Bartholomew's Hospital, in Gloucester, against the above-named Company, praying that the defendants might be restrained by injunction from issuing their warrant to the sheriff to summon a jury for determining the amount of the compensation to be paid to the hospital for certain lands referred to in a certain notice of the 25th of September, 1847, stated in the bill to have been served on the plaintiffs, and from instituting any proceedings for compelling the plaintiffs, as trustees of the hospital, to sell the land, houses, &c. in the notice or the plan thereto annexed mentioned, or for assessing or determining the sum of money to be paid for the same, the

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plaintiffs thereby offering to treat with the defendants for the sale of so much of the said land, described in their schedule by the numbers 5, 6, 7, and 8, as was necessary for making or maintaining the said railway and works on the line, and in the manner described in the plans and books of reference of the Gloucester and Birmingham Railway Extension Act, 1845, and that the defendants might be restrained from entering upon, or taking possession of, or constructing any railway, or otherwise using or interfering with the said land numbered 5, 6, 7, and 8, except only so much as was necessary for making and maintaining the railways and works authorised to be made therein by the last-mentioned act.

The bill stated the act of Parliament (8 & 9 Vict. c. clxxxiii.) with which the Lands', Companies', and Railways' Clauses Consolidation Acts were incorporated, and by which the Company were empowered, subject to the provisions of the said general acts, to make and maintain their railways and works between and through the places therein mentioned, in the line and upon the lands delineated on the plans and described in the books of reference, and to enter upon, take, and use such of the said lands as should be necessary for such purpose.

By the 10th section of the special act, it was enacted, "that the quantity of land to be taken by the Company for extraordinary purposes shall not exceed ten acres."

It appeared from the affidavits, that the piece of land in dispute was a narrow strip running parallel to and adjoining the Birmingham and Gloucester Railway, and that it was numbered and described in the schedule to the deposited plans. The Company had endeavoured to purchase the whole of this piece by private contract; but the trustees of the hospital, thinking the sum offered insufficient, had refused to sell. After the attempt to purchase by contract had failed, the Company proceeded to take the necessary steps for obtaining possession under the compulsory powers

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of their act, alleging that the whole of the land in question was required by them for the purpose of constructing two extension lines out of the Birmingham and Gloucester Railway to the High Orchard Basin of the Gloucester and Berkeley Canal, for providing room for increased traffic, for conveying goods into the goods-station of the Company, and for lines and sidings for wagons used in the conveyance of goods to and from the dock basin to the railway.

It was proposed that two extension lines should cross the plaintiffs' land, one at one end, and the other at the other end of it, and that the two lines should unite near the dock basin.

The plaintiffs, by their affidavits, shewed that the piece of land in question was numbered in the schedule of the Company's act, but that certain portions of it were at a greater distance than 100 yards from either of the proposed extension lines; and they contended that the Company were only authorised to take so much of their land as was necessary for the formation of one extension line across the land; and the object of the present suit was to prevent the Company from taking any other portion of their land than was absolutely necessary for that purpose alone.

Mr. *Bates* applied in the vacation for an injunction in the terms of the prayer of the bill.

Mr. *Willcock* opposed this motion on behalf of the Company.

Oct. 22nd.

The VICE-CHANCELLOR.—By the statute 8 & 9 Vict. c. clxxxiii, the defendants are empowered to make certain lines of railway, and do certain matters, including the extension of the main line of the Birmingham and Gloucester Railway to the High Orchard Basin of the Gloucester and Berkeley Canal, at Gloucester.

The several matters which the defendants are thus em-

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powered to do are referred to in the statute, sometimes by the expression "railways and works," sometimes by the word "works" only. In order to make the above extension of the main line of the Birmingham and Gloucester Railway, it is necessary that the Company should take part or parts of a rope-walk belonging to the plaintiffs, and so far as this may be necessary for the construction of one extension line from the existing Gloucester station, the plaintiffs do not deny the right of the defendants to take their property under the compulsory clauses of their act: but the defendants claim and have asserted a right to do more than this,—they claim and have asserted a right to make two extension lines from different points in the existing Gloucester station, both leading to the basin; and beyond this they claim and have asserted a right to take the whole of the plaintiffs' property for other purposes than the mere extension of the main line.

Those other purposes for which the defendants say they require and claim, and have asserted a right to take the plaintiffs' property, are—first, to provide room for the increased traffic to be anticipated from the extension; secondly, in conveying goods brought from, and to be conveyed to the dock canal basin in the goods-station of the Company; and, thirdly, (as distinguished from the two former purposes) for lines and sidings in which the wagons for the conveyance of goods to and from the canal, dock, and basin, may wait till a sufficient number is collected to form the trains, and may be marshalled and arranged. The right to take the whole of the plaintiffs' property for these several purposes is asserted without distinction as to what part is required for one purpose, and what for another.

The plaintiffs, admitting the right of the defendants to take their property to form one extension line, deny their right to take it for any other; and the bill in this cause has been filed to restrain the defendants from taking the plaintiffs' property, except for that single purpose. Omit-

ting, for the present, the question as to the right of the defendants to make more than one extension line from different parts of their station to the basin, the question as to their right to take the plaintiffs' property for the purposes hereinbefore mentioned will be simplified, in point of expression, by observing that the claim of the defendants is in part a claim of right to make a new station, or add to the old one. This was admitted by the defendants' counsel; and if this claim cannot be sustained to the full extent contended for by the defendants, the injunction must go.

Now, it was admitted by the defendants that they have no right to take any part of the plaintiffs' property, except under the stat. 8 & 9 Vict. c. clxxxiii, and such other statutes as are incorporated with it; and I certainly am expressing a very confident opinion, when I say that a power confined to making an extension line of an existing railway from its terminus at a station to a basin beyond it, would not, *per se*, carry with it a power to take land for the purposes of a new or additional station —purposes which, so far as my experience goes, are invariably expressed (either directly or by implication) where they are contemplated by the legislature—in every act for making railways. The statute I have referred to, upon the face of it, does nothing more than substitute a railway conveyance instead of common carriage between the existing station and the basin; and there is abundance of matter in the statute to satisfy the word "works," upon which so much was said in argument, without attributing the extraordinary effect contended for by the defendants. If I am right in my conclusion, that a railway communication between the existing station and the basin was alone contemplated, and is alone provided for by the 8 & 9 Vict. c. clxxxiii., (excluding the statutes incorporated into it), I am satisfied that the incorporation into that statute of the Railways' Clauses Consolidation Act, and the old acts under which the main line was made, can only be applied to enable the defendants to make the railway communication

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contemplated by the 8 & 9 Vict. c. clxxxiii., and not to make a new or additional station. But it is obviously for the benefit of both parties that the Company should have the entire property; and I cannot too strongly press upon all concerned the expediency of settling this matter by arrangement without further litigation. The injunction must issue.

By an extension line, as the term is used above, I do not mean one set of rails only. No question, as I understand the case, has arisen upon this.

1848. *Jan. 29th.*

This was a motion to dissolve the injunction granted by the Vice-Chancellor.

Mr. *James Parker* and Mr. *Willcock*, in support of the motion.

Mr. *Romilly* and Mr. *Bates*, contrà.

The LORD CHANCELLOR.—The injunction sought to be discharged restrains the Company from taking and using any more of the lands of the plaintiffs than is necessary for the purpose of making and maintaining the railway and works authorised to be made thereon by the act. It is by virtue of the act only that they were authorised to take any part of the plaintiffs' land; the injunction, therefore, only prohibits the Company from doing what they have no authority to do, without informing them what are the limits of such authority. That is leaving the question between the parties undecided, but to be discussed upon a motion for breach of the injunction. I do not believe that the Vice-Chancellor intended that the injunction should be in this form when he decided this question; and this appears to be a very objectionable form of order, and one of which I have taken frequent opportunities of expressing my disapprobation. There are perhaps cases in which this cannot be avoided; but when the matter in dispute is distinctly raised, and is ready for decision, I think the right should

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be declared, and the injunction founded upon such declaration be in such words that the order may inform the defendant what the opinion of the Court is as to the limits of his right, and not expose him, in the exercise of such right, to the consequences of violating so vague an injunction.

The question between these parties is very simple. The piece of land sought to be taken from the plaintiffs by the Company is described in the map, plan, and book of reference deposited with the clerk of the peace; and the act of the Company; after describing the line of the railway, authorises the Company to make and maintain the railway and works thereby authorised in the line and in the manner after provided, and after reciting the deposit of the plan, section, and books of reference, authorises the Company to make and maintain the railway and works in the line and upon the lands delineated upon the said plans and described in the said book of reference, and to enter upon, take, and use such of the said lands as shall be necessary for such purpose. The plaintiffs do not dispute the right of the defendants to take so much of this piece of land as may be required for forming the line of railway, but deny their right to take any part which exceeds what is wanted for that purpose, although required by the Company for the purposes of the railway in forming or enlarging a station, and in forming places for carriages to collect and wait till the trains are ready to start, no part of which, they contend, is authorised by the act; and that is the whole question, which must be decided by the words of the act, with the interpretation of such words to be found either in the interpretation clause or the provisions of the special, or of the Railways' Clauses Consolidation Act.

The authority is, to take and use so much of the land in question as shall be necessary for the purpose of making and maintaining the said railway and works. The Railways' Clauses Consolidation Act, in the 3rd section, de-

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clares that the expression "railway" shall mean the railway and works by the special act authorised to be constructed; and the 16th section declares that it shall be lawful for the Company, for the purpose of constructing the railway, amongst other things, to erect and construct such houses, warehouses, offices, and other buildings, yards, stations, wharfs, engines, machinery, apparatus, and other works and conveniences as they may think proper; and the 45th section authorises the Company, in addition to the lands authorised to be compulsorily taken by them, to purchase adjoining or near the railway a certain extent of land for extraordinary purposes, and for the purpose of making and providing additional stations, yards, wharfs, and places for the accommodation of passengers, and for receiving, depositing, loading, or unloading goods or cattle to be conveyed upon the railway, and for the erection of weighing-houses, toll-houses, offices, warehouses, and other buildings and conveniences; and the quantity of lands to be purchased for such extraordinary purposes is by the 10th section of the special act not to exceed ten acres.

There are no provisions in the special act, or in the Railways' Clauses Consolidation Act, more distinct than these which authorise the formation of stations or other buildings and conveniences which are essential to the working of all railways; and if these provisions do not include such a power, Parliament has authorised the extension of the railway in a manner likely to produce a great increase of traffic, without any power to make those arrangements which such additional traffic will render indispensable.

It seems to me, therefore, sufficiently clear, that these provisions do include ample power for these purposes. The term "railway" by itself includes all works authorised to be constructed; and for the purpose of constructing the railway, the Company are authorised to construct such stations and other works as they may think proper; and, assuming that the lands authorised to be compulsorily taken would be

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taken and used for all ordinary stations and works, the act provides, that, for extraordinary purposes, such as additional stations and conveniences, this railway may purchase certain additional quantities of land.

I consider that all land authorised to be taken as necessary in the terms of the act, for the purpose of making and maintaining the railway and works, is liable to be so taken, whether necessary for the actual line of the railway, or for stations or other conveniences necessary for the working of the railway. The purposes for which the plaintiffs' land is proposed to be applied, clearly fall within that description. Such, indeed, appears to have been the construction assumed and adopted in several cases. If, in the cases of *Eton College* v. *Great Western Railway* (*a*) and *Lord Petre* v. *Eastern Counties' Railway* (*b*), the Company could not have formed stations without special authority, what was the necessity of introducing special prohibitions, and why were the judgments of the Courts confined to such special prohibitions, when, according to the plaintiffs' argument, the Companies would, for want of special authority, have been incompetent to construct such stations?

The motion for the injunction must, I think, be refused with costs.

(*a*) Ante, Vol. 1, p. 200. (*b*) Ante, Vol. 3, p. 367.

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BEFORE THE VICE-CHANCELLOR OF ENGLAND AND THE LORD CHANCELLOR.

July 23rd, 24th, & 27th.

A Railway Company gave a landowner notice of their intention to take portions of his land for the purposes of their railway, whereupon a treaty was commenced, pending which the Company, without notice to him, proceeded, under the 85th section of the Lands' Clauses Consolidation Act, to have the lands valued, and caused a bond to be delivered conditioned for payment on demand of the purchase-money to the plaintiff, or for the deposit of the same on demand in the Bank; and on the bond was indorsed a receipt of the Accountant-General, by which he certified that he had received the sum mentioned in the bond, and had placed the same to the credit of "*Ex parte The Great Northern Railway Company the Account of T. P.*" The Company afterwards gave another notice, that they required certain lands coloured yellow, under the 32nd section of the Railways' Clauses Consolidation Act, for the temporary purposes mentioned therein generally, and without stating the particular purpose for which such lands were required.

Held, by the Vice-Chancellor of England, that, in the deed appointing a surveyor under the 58th section of the Lands' Clauses Consolidation Act, it is not necessary that a description of the lands to be valued should be inserted. That, where lands are required by a Company for temporary purposes, the notices should specify the particular purpose for which such lands are required. That the words "on demand," inserted in a bond given by a Company to a landowner under the 85th section of the above act, renders such bond informal; and that the plaintiff was entitled to his injunction absolute.

Held, by the Lord Chancellor on appeal, that the bond in this case was informal; but he refused to grant an injunction absolute, limiting it to the time when a proper bond should have been delivered by the Company.

POYNDER *v.* The GREAT NORTHERN RAILWAY COMPANY.

THE bill in this case stated that the plaintiff was owner in fee of certain lands at Islington, subject to a lease for seven years, whereby, however, a power was reserved to the owner, his heirs, and assigns, at any time during the said term, to enter upon any part of such lands to dig or break up the surface, for quarrying or brickmaking, on payment of 4*l.* 10*s.* per acre, and also to resume possession on giving two months' notice and paying 4*l.* 10*s.* per acre.

That the Great Northern Railway Company, in pursuance of the powers in their act, with which the Lands' Clauses and the Railways' Clauses Consolidation Act were incorporated, on the 9th of February, 1847, caused a notice to be served on the plaintiff, dated the 31st of January, 1847, to treat with them for the sale of parts of the land comprised in the lease, containing by the description in the body of the notice, 3*r.* 4*p.*, but in the plan thereto annexed, 3*r.* 2*p.*, and numbered 499, 557, and 503.

The plaintiff, on the 13th of April following, put in his

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claim for the sum of £1338, for the 3*r.* 2*p.* of land, and at the same time gave notice that he would require the Company to take other part of the land numbered 557, which was not comprised in the notice, and, in the event of the Company not purchasing the same, the plaintiff claimed £500 damages for severance, in addition to the £1338.

Divers negotiations took place between the surveyor appointed by the plaintiff, and G. Smith, the surveyor appointed by the Company, for the purpose of determining the amount to be paid to the plaintiff; but the surveyors differing, and an umpire appointed by them having declined to act, no agreement was entered into.

The Company then proceeded to get a surveyor appointed under the 85th section of the Lands' Clauses Consolidation Act; and on the 6th of July, 1847, the Company delivered a bond to the plaintiff, with two sureties, whereby it was declared that such bond shall be void if the said Company and the said R. B., P. R. (the sureties), or any of them, do and shall, on demand, well and truly pay or cause to be paid to the plaintiff, his heirs, executors, administrators, or assigns, or do and shall, on demand, well and truly pay or cause to be paid to the plaintiff, his heirs, &c., or do and shall, on demand, deposit in the Bank of England, under the provisions of the said Lands' Clauses Consolidation Act, 1845, the amount of all such purchase-money or compensation as shall, in the manner provided by the said Lands' Clauses Consolidation Act, 1845, be determined to be payable by the said Company in respect of the said lands therein mentioned, being in fact the lands containing 3*r.* 2*p.*, therein described as 3*r.* 4*p.*, together with interest thereon after the rate of £5 per cent. per annum, from the time of entering upon such lands until such purchase or compensation monies shall be paid or deposited as hereinbefore mentioned.

The following receipt was indorsed on the bond:—"Received, pursuant to the Great Northern Railway Act, 1846, and the Lands' Clauses Consolidation Act, of the Great

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Northern Railway Company, the sum of £950, which money is placed to the account of &c., to the credit of *Ex parte The Great Northern Railway Co., the account of Thomas Poynder,*" &c.

That the sum of £950, which had been deposited in the Bank in the plaintiff's name, was the sum at which the Company's surveyor (the same person who had failed to agree on the first arbitration) had estimated the land; and that such surveyor purported to be appointed by two justices of Middlesex, on the application of the Company, and without notice to the plaintiff.

That the Company had not complied with the terms of the Lands' Clauses Consolidation Act, and in particular they were not entitled to put the 85th section into force pending an arbitration. That the appointment of the surveyor was informal, inasmuch as the schedule annexed to such appointment did not particularly specify, either by means of a plan or otherwise, what particular parts of the pieces of land numbered 499, 557, and 503, were to be valued, or in what manner the line of the said railway would cross such lands, or how such lands would be severed; and the only description given by the said appointment of the lands to be valued was the description given in the schedule to the appointment, which schedule merely directed the surveyor to value 3*r.* 4*p.* of lands numbered, &c.; and the valuation of the surveyor was invalid, inasmuch as the lands valued were only specified by reference to the schedule annexed to the appointment.

That the Company had no power to appoint sureties without notice to the plaintiff; and that the condition of the bond was informal and invalid, because under it a legal demand was rendered necessary, and also it was competent for the obligors at their option to pay the money into the Bank of England or to the plaintiff, whereas the plaintiff, being owner in fee of the land, was absolutely entitled to the purchase-money.

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That the Company had, on the 12th of July, 1847, without plaintiff's consent, entered upon the 3*r.* 4*p.* of his land, and had also, on the same day, given notice that at the expiration of three weeks from the date of the service, the Company intended to enter upon the lands described in the plan thereunto annexed, and coloured yellow, which were required by the Company for the several purposes thereinafter mentioned, some or one of them, namely, for the purpose of taking earth or soil by side cuttings therefrom, and of depositing soil thereon, and of obtaining materials therefrom for the construction of the railway and the accommodation works connected therewith, and of forming roads thereon to or from or by the side of the railway.

And the bill prayed an order and injunction, as well ad interim as perpetually, to restrain the Company from making their railway over the land belonging to plaintiff, or over any part or parts thereof, without plaintiff's concurrence, and from excavating, digging, or otherwise using such lands without plaintiff's concurrence, and from continuing any longer in possession of such lands or any part thereof without plaintiff's concurrence, plaintiff offering to relinquish all title to the £950 paid into the Bank. And a similar injunction was asked with respect to the lands coloured yellow.

The defendants, the Great Northern Railway Company, in their affidavits, stated that the surveyor appointed to value the land had in his possession the plans and sections of the railway, and was well acquainted with the portions of plaintiff's land required by the Company.

The plaintiff now moved for an injunction in the terms of the prayer of the bill.

Mr. *Bethell* and Mr. *Craig*, for the plaintiff.

Mr. *Rolt* and Mr. *Denison*, for the Company.

Mr. *Craig* replied.

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Northern Railway Company, the sum of £950, which money is placed to the account of &c., to the credit of *Ex parte The Great Northern Railway Co., the account of Thomas Poynder,*" &c.

That the sum of £950, which had been deposited in the Bank in the plaintiff's name, was the sum at which the Company's surveyor (the same person who had failed to agree on the first arbitration) had estimated the land; and that such surveyor purported to be appointed by two justices of Middlesex, on the application of the Company, and without notice to the plaintiff.

That the Company had not complied with the terms of the Lands' Clauses Consolidation Act, and in particular they were not entitled to put the 85th section into force pending an arbitration. That the appointment of the surveyor was informal, inasmuch as the schedule annexed to such appointment did not particularly specify, either by means of a plan or otherwise, what particular parts of the pieces of land numbered 499, 557, and 503, were to be valued, or in what manner the line of the said railway would cross such lands, or how such lands would be severed; and the only description given by the said appointment of the lands to be valued was the description given in the schedule to the appointment, which schedule merely directed the surveyor to value 3*r.* 4*p.* of lands numbered, &c.; and the valuation of the surveyor was invalid, inasmuch as the lands valued were only specified by reference to the schedule annexed to the appointment.

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And the bill prayed an order and injunction, as well ad interim as perpetually, to restrain the Company from making their railway over the land belonging to plaintiff, or over any part or parts thereof, without plaintiff's concurrence, and from excavating, digging, or otherwise using such lands without plaintiff's concurrence, and from continuing any longer in possession of such lands or any part thereof without plaintiff's concurrence, plaintiff offering to relinquish all title to the £950 paid into the Bank. And a similar injunction was asked with respect to the lands coloured yellow.

The defendants, the Great Northern Railway Company, in their affidavits, stated that the surveyor appointed to value the land had in his possession the plans and sections of the railway, and was well acquainted with the portions of plaintiff's land required by the Company.

The plaintiff now moved for an injunction in the terms of the prayer of the bill.

Mr. *Bethell* and Mr. *Craig*, for the plaintiff.

Mr. *Rolt* and Mr. *Denison*, for the Company.

Mr. *Craig* replied.

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The VICE-CHANCELLOR.—I am of opinion, that, as it has been provided by the act of Parliament, that in case of any dispute between the parties a surveyor should be appointed, it was quite sufficient that he should know what he had to survey, and that the act does not require that a description of the precise lands to be taken should be inserted in the appointment. It was the duty of the parties interested, in order to prevent misunderstanding, to see that the surveyor's valuation related to the lands in dispute, because, if it were of any other lands, the valuation would be worth nothing. There is nothing, however, in the act which extends to this, for it merely states, that, after due notice to the party who fails to appear, the justices shall, by writing under their hands, nominate an able practical surveyor for determining the value and compensation. It does not appear that notice was not given; and from circumstances which have arisen, we may conclude that the justices had power to appoint a surveyor, and that such surveyor performed the duties for which he was appointed, and made a valuation of the land in question. As to the sufficiency of the sureties, I have already remarked, that if, as it has been decided, the true construction be, that the proceedings may be *ex parte*, then the words of the act, "in case the parties differ," have no application (*a*).

The bond has been given, and a sum of money deposited; and that part of the bond which provides for the payment of the money has been complied with, and the money has been paid into the Bank. The only question therefore as to this part of the matter is, whether the form in which the receipt has been given, is sufficient to shew that the money has been properly paid. And looking at the receipt itself, it appears to me that the terms of the act have been complied with, for the introduction of the words, "Ex parte The

(*a*) *Bridges* v. *The Wilts, Somerset, and Weymouth Railway Company*, ante, Vol. 4, p. 622.

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Great Northern Railway," does not render that payment wrong which would have been otherwise right; for it appears to me to be nothing more than a description of the party who pays the money in. The act itself requires nothing more than that the money shall be deposited in the Bank on behalf of the parties interested, and it also requires that it shall be paid to the account of the Accountant-General of the Court, to the credit of the parties interested in the land; therefore, the mere fact of the money having been paid in Ex parte The Great Northern Railway, when it stands to the account of Thomas Poynder, forms, in my opinion, no objection at all.

With respect to the piece of land coloured yellow, it was essential that the notice should specify the purposes for which it was required, in order that the parties might know in what manner to deal with it; and the consequence of the notice being in its present form is, to throw on the land-owners the burthen of making out their objections to all the four different purposes provided by the act. The owner was entitled to know at once wherefore the notice was given, since that would have enabled him to point out other lands which might be applied for the purposes of the Company. As to this part of the case, I will at once grant the injunction: but as to the other part, namely, in reference to the words "on demand," which have been objected to in the bond, although it has been pressed upon me that they are unimportant, and that, when an action is brought for a debt, the action itself constitutes the demand, I will inquire what is the rule at law.

On a subsequent day his HONOR stated, that he was of opinion that there was a decided objection to the form of the bond, and he granted the injunction as prayed.

The Company appealed from so much of the order made by the *Vice-Chancellor of England*, as restrained them from

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making their railway over the lands containing 3*r.* and 2*p.*, otherwise 3*r.* and 4*p.*, belonging to the plaintiff, and from excavating and using such lands, or any parts thereof, and from continuing any longer in possession of such lands or any part thereof.

Mr. *Rolt* and Mr. *Denison*, for the Company, contended, that although the words of the 85th section of the general act directed a bond to be given, "conditioned for payment to such party," or for deposit in the Bank for the benefit of the parties interested in such lands, as the case may require, without more, yet the words "on demand," added by the Company, did not in any manner affect the validity of the bond or the rights of the landowner—they were mere surplusage. A bond payable on demand was similar to a note payable on demand, in which no one supposed that the words used made a legal and formal demand necessary. Bringing an action for the money would be considered a demand: *Norton* v. *Ellam* (*a*); and the bond, therefore, would give the plaintiff an instant right of action, which was all the act contemplated, or could be given under any circumstances.

Mr. *Bacon* and Mr. *Craig*, contrà.—The form of the bond prescribed by the act is certain, and the only legal security the Company can give under it. The plaintiff is entitled to such a bond before the Company can enter on his land.

The LORD CHANCELLOR.—As the bond stands, it gives the plaintiff the option of either receiving the money or having it paid into Court, whatever the case may be, and therefore he may be considered rather a gainer than a loser by the departure in the form of the bond from that strictly

(*a*) 2 Mee. & W. 461.

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prescribed by the act. And this very circumstance strikes me as the most serious objection to the bond; for the object of the act is to protect the interest of all parties under disability, by having the money paid into the Bank in cases where any such parties were concerned; whereas this bond would compel payment to the plaintiff in any event. He says, indeed, he is owner in fee, but I cannot take that for granted before the title is investigated. I think, therefore, the condition of the bond ought to be, to pay either to the plaintiff or into the Bank, as the case may require, according to the provisions of the act.

Whatever ground, therefore, the *Vice-Chancellor* may have proceeded upon in granting the injunction, I see no reason for dissolving it. On the contrary, I think it is for the interest of all parties, including the Railway Company itself, that it should be continued until they execute a bond in the proper form. If I were to dissolve the injunction, the plaintiff would not be satisfied, but would bring an ejectment. I find that the terms of the act have been departed from without any reason assigned; and I see that by reason of this departure other parties who may be interested in the funds may possibly be prejudiced. Let the injunction, therefore, be continued until the Company shall have given a bond in conformity with the provisions of the act.

Mr. *Bacon* asked that the injunction should be absolute, as the *Vice-Chancellor of England* had granted it; and when the Company should have given a proper bond, they might come to the Court to ask to have it dissolved.

The LORD CHANCELLOR, however, was of opinion that the injunction in the form he had ordered might possibly save the expense of another application, and that the injunction should in the first instance be limited as he had already decided.

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BEFORE VICE-CHANCELLOR WIGRAM.

Jan. 30. Ex parte THE CORPORATION OF CAMBRIDGE, Re THE EASTERN COUNTIES RAILWAY COMPANY.

Under the 42nd section of the Eastern Counties Railway Act, (which is in the same terms as the 69th section of the Lands' Clauses Consolidation Act), money paid for the purchase of land taken compulsorily by a Company from a municipal corporation may be applied in paying off an incumbrance affecting other lands belonging to the same corporation.

THE Eastern Counties Railway Company, under the powers contained in their act, (6 & 7 Will. 4, c. cvi.,) took certain land belonging to the Corporation of Cambridge, which was required for the purposes of the railway, and paid the purchase-money into court in the manner required by that act. Other portions of land belonging to the same corporation had been mortgaged, and the monies so raised applied for municipal purposes.

The petition prayed that the purchase-money might be applied in paying off these incumbrances.

Mr. *Hare*, for the petition, relied on the 42nd section (*a*)

(*a*) The 42nd section, after directing the payment into court of the purchase-monies amounting to £200, in the case of there being no person to give a valid receipt for the same, provides, that the money when so paid in shall there remain until the same shall, by order upon petition, be applied either in the redemption of the land-tax, "or in or towards the discharge of any debt or other incumbrance affecting the said lands or affecting other lands standing settled therewith, to the same or the like uses, trusts, intents or purposes, as the said Court of Exchequer shall authorise to be purchased or paid, or such part thereof as shall be necessary, or until the same shall, upon the like application, be laid out," &c. in the purchase of other lands, which shall be conveyed, limited, and settled to, for, and upon such and the like uses, trusts, intents and purposes, and in the same manner as the lands which shall be so purchased, &c stood settled and limited.

In the general act (8 Vict. c. 18, s. 69) the application of the monies deposited is to be "in the purchase or redemption of the land-tax, or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes," or &c.

of the Eastern Counties Railway Act, and on the Municipal Corporation Act.

1848.

Ex parte The Corporation of Cambridge, *re* The Eastern Counties Railway Co.

Mr. *Heathfield*, for the Company, submitted whether an existing mortgage of land held by a corporation quite distinct, and probably under a different title from that affecting the land taken by the Company, would come within the terms of the 42nd section.

The Vice-Chancellor was of opinion that the terms of the 42nd section applied to the whole of the land belonging to the Corporation, and made the order as prayed.

BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

March 3.

Ex parte The Churchwardens and Overseers of Bicester, Re The Buckinghamshire Railway Company.

On application, made by the churchwardens and overseers of a parish to have a sum of money, which had been paid into court by a railway company for the purchase of certain buildings and land, paid out to them for the purpose of buying other land and erecting other buildings in substitution of those taken by the Company, the Court refused to make a summary order, and directed a reference to the Master.

THIS was the petition of the churchwardens and overseers of Bicester, and it stated that the Oxford and Bletchley Junction Railway Company required to purchase a certain house called the Pest House, and a piece of garden-ground adjoining, in the parish of Bicester, and the petitioners entered into a contract for the sale thereof, for £600.

The petitioners had previously sold another piece of parish land to the Company, and the whole sum then standing in the Bank amounted to £1310. The petition prayed that £600, part of the said sum of £1310 in the Bank, might be paid to the petitioners, they undertaking forthwith to apply the same in erecting a suitable building, instead of that taken by the Railway Company, and to be used for the like purposes for which the messuage called the Pest House was used when taken by the Company.

1848.

Ex parte The CHURCHWARDENS AND OVERSEERS OF BICESTER, *re* The BUCKINGHAMSHIRE RAILWAY Co.

Mr. *Rasch*, for the petitioners, relied on the 69th section of the Lands' Clauses Consolidation Act, with which the Railway Act in question was incorporated, and submitted that the Court had jurisdiction at once to make the order, without a reference.

Mr. *Speed* appeared for the Railway Company, and did not object.

His HONOR, however, was of opinion that he could not, without a reference to the Master, make the order as prayed.

BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

March 4.

Ex parte FRANKLYN, Re THE GREAT NORTHERN RAILWAY COMPANY.

The Court will not, under the 70th sect. of the Lands' Clauses Consolidation Act, make an order for the interim investment of purchase-money deposited in court by a Railway Company on mortgage securities.

THIS was a petition presented by the tenant for life of certain lands purchased by a Railway Company, praying that the Master might be ordered to review his report, whereby he had reported, that, where money had been paid into court by a Railway Company, to be applied according to the provisions of the 69th section of the Lands' Clauses Consolidation Act, such monies could not be invested, *ad interim*, on mortgage securities.

The application was made under the 70th section of the Lands' Clauses Consolidation Act (*a*).

(*a*) The 69th section directs the application of the monies deposited; and the 70th section provides, "until the money can be so applied, it may, upon the like order, be invested by the said Accountant-General in the purchase of £3 per Cent. Consolidated, or £3 per Cent. Reduced Bank Annuities, or in Government or *real securities*, and the interest, dividends, and annual proceeds thereof paid to the party who would for the time being have been entitled to the rents and profits of the lands."

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Ex parte FRANKLYN, *re* The GREAT NORTHERN RAILWAY Co.

Mr. *Metcalf*, for the petitioner.

Mr. *Denison*, for the Railway Company, did not object.

The VICE-CHANCELLOR said, that he entertained doubts as to whether mortgage securities did come within the meaning of the 70th section; and, doubting, he would not decide against the opinion of the Master.

His Honor refused to make any order on the petition.

BEFORE THE VICE-CHANCELLOR OF ENGLAND.

April 28.

Ex parte THE RECTOR OF LITTLE STEEPING, Re THE EAST LINCOLNSHIRE RAILWAY COMPANY.

A sum of money, part of a larger sum paid by a Railway Company for glebe land, ordered to be paid to the rector for the time being for his own use.

THIS was a petition presented by the rector of Little Steeping, stating, amongst other things, that the Railway Company, in accordance with the 9th section of the Lands' Clauses Consolidation Act, had caused a part of the glebe, which they required for the purposes of their railway, to be valued, and, by such valuation, it had been determined that the sum of £250 was the value, and should be paid for the land, and £150 was the compensation, and should be paid by the Company for or in respect of permanent or other damage or injury to be sustained by the petitioner, by reason of the severing or otherwise injuriously affecting his lands by the exercise of the powers of the Company.

And the petition prayed, that, out of the sum of £400, the sum of £30 might be paid over to the petitioner for his

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Ex parte The Rector of Little Steeping, *re* The East Lincolnshire Railway Act.

own use, under the powers of the 73rd section (*a*) of the Lands' Clauses Consolidation Act, as compensation for the injury, inconvenience, or annoyance which he had sustained; and it also prayed a reference as to a contract entered into by the petitioner for the purchase of other lands in the stead of those taken by the Company.

Mr. *Karslake*, in support of the petition, produced an affidavit of a practical surveyor, and of a farmer, whereby they deposed that the necessary alteration in the fences and distribution of the glebe lands in consequence of the intersection by the railway would amount to £30, and that that was a proper sum to be paid to the rector, independently of the actual value of the land.

The Vice-Chancellor made the order as prayed.

(*a*) Part of the 73rd section is as follows:—"Provided always, that it shall be in the discretion of the Court of Chancery in England to allot to any tenant for life or for any other partial or qualified estate, for his own use, a portion of the sum so paid into the Bank as compensation for any injury, inconvenience, or annoyance which he may be considered to sustain, independently of the actual value of the lands to be taken, and of the damage occasioned to the lands held therewith by reason of the taking of such lands and the making of the works."

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BEFORE THE VICE-CHANCELLOR OF ENGLAND.

Ex parte THE VICAR of BREDICOT, Re THE WORCESTER, BIRMINGHAM, AND WOLVERHAMPTON RAILWAY COMPANY. *June 2nd.*

Where money in court, the produce of part of the glebe taken by a Railway Company exceeded the proposed purchase by £20, the Court refused to pay the whole sum to the petitioner, and directed the surplus, after payment of the purchase-money, to be invested, and the dividends paid to the vicar for the time being.

THIS was a petition presented by the vicar of Bredicot, in Worcestershire, praying the confirmation of the Master's report, whereby he had approved of a purchase of certain lands, which were proposed to be purchased with the monies arising from part of the glebe taken by the above-named Railway Company.

It appeared that the money in court amounted to £200, and that the purchase-money of the pieces of land was £180.

Mr. *Greene*, for the petitioner, asked that it might be ordered that the whole sum in court might be paid to the vicar, he undertaking to complete the purchase; and in support of this request, he produced an order made by his Honor in another petition, in which the whole money in court, exceeding the proposed purchase by £3, had been paid to the petitioner.

The VICE-CHANCELLOR, however, refused to make the order as to the whole sum, and directed the surplus to be invested, and the dividends paid to the vicar for the time being; at the same time observing, that although he had on a former occasion ordered the surplus to be paid to the petitioner, yet he had done so on account of the smallness of the sum, and not perhaps strictly in accordance with the act of Parliament: but he much wished that the Legislature would pass some act to enable the Court to deal at once with such sums, which would otherwise necessarily remain unapplied, the expenses of any application far exceeding the sums themselves.

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BEFORE THE VICE-CHANCELLOR OF ENGLAND.

June 9th.

Ex parte THE EASTERN COUNTIES RAILWAY COMPANY.

Where a Railway Company had paid the estimated value of a piece of land into court, and afterwards concluded the purchase by contract, the Court will order the payment out to the Company of the sum deposited without service on the vendor, on production of an affidavit that his costs, according to the act, had been discharged.

THIS was a petition by the above-named Railway Company, praying that a sum of £1000, which had been paid into court under the 85th section of the Lands' Clauses Consolidation Act, as the estimated value of a piece of land entered upon by the Company, might be paid out to them.

The petition stated, that the Company had come to an agreement with the owner as to the price to be paid for the land, and that he had received his purchase-money, and executed the conveyance to the Company.

Mr. *Cotterill*, for the petitioners, stated, that the whole purchase having been concluded, the Company had not thought it necessary to serve the vendor with the present petition; and he produced an affidavit, stating, that all costs, according to the act, had been paid to the vendor.

The VICE-CHANCELLOR considered that the production of the affidavit rendered service on the vendor unnecessary, and made the order accordingly.

Note.—Whether an affidavit, that all costs had been paid, is necessary—*quære*. In cases of deposit by way of security under the 85th section of the Lands' Clauses Act, all that the Company appear, by the 87th section, to be required to do, in order to entitle themselves to the payment out of such deposit, is to satisfy the Court that the *condition of the bond* has been fully performed.

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BEFORE THE VICE-CHANCELLOR OF ENGLAND AND THE LORD CHANCELLOR.

The Exeter and Crediton Railway Company *v.* Buller and Others.

May 24th, 25th, & 28th; June 7th, 8th, & 9th.

A railway company was promoted, and the act obtained, with the view of the line being constructed on the broad gauge, and negotiations for a lease to the Great Western Railway Company were entered into, with the sanction of the legislature and of the then shareholders. Before, however, these negotiations had been carried into effect, a change took place in the sentiments of the shareholders, by means, as it was alleged, of large purchases of shares by the South Western Railway Company, who thereby acquired the majority of votes, and the control over the new Company. The chairman, and six out of the ten directors, however, refused to carry out the wishes of the majority, whereupon the three directors filed a bill, praying an injunction against the seven directors. The seven directors then moved to have this bill taken off the file, and subsequently applied to have an injunction, obtained against them ex parte, dissolved :—

Held, by the Lord Chancellor, affirming the judgment of his Honor the Vice-Chancellor of England, that the decision of the Court on the motion should stand over until an opportunity had been given to the shareholders to express their opinion as to the objects of the bill.

And, *held*, by the Vice-Chancellor of England, that a motion to dissolve the injunction, obtained ex parte, be dissolved, with costs.

THIS was a motion, by seven directors of The Exeter and Crediton Railway Company, to have a bill, filed against them by three other directors on behalf of the same Company, taken off the file, which application was followed by a motion, on the part of the three defendants, to have an injunction dissolved, which had been obtained ex parte, to restrain them from making and entering into, or setting the seal of the Company to any agreement for using their railway on the broad gauge; and also from using or taking any proceedings towards opening, making, or using the said railway upon the broad gauge; and also from forming or constructing, or taking or using any measures to form or construct any junction, or entering into any agreement for that purpose, with the Bristol and Exeter Railway Company; and also from leasing or selling, or entering into any agreement or contract for the leasing or selling their railway to the Bristol and Exeter Railway Company, or to any other Company working upon the broad gauge, and in particular from making or entering into, or affixing the seal of the Exeter and Crediton Railway to, a proposed lease, or

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agreement for a lease of that Company, to the Bristol and Exeter Railway Company; and also from doing anything to prevent the Exeter and Crediton Railway Company from adopting or confirming an agreement with the Taw Vale Railway Company.

The facts of this case were as follow:—The Exeter and Crediton Railway Company's Act, with which the General Consolidated Acts were incorporated, provided, amongst other things, that there should be ten directors, three of whom should form a quorum; and that it should be lawful for the Company, with the approbation of three-fifths of the shareholders present, personally or by proxy, at a general meeting convened for that purpose, to grant a lease of the undertaking thereby authorised to be made, to the Bristol and Exeter Railway Company, or to any other Company then or thereafter to be incorporated or constituted for making any railway which might form a junction with the railway thereby authorised to be made.

Negotiations were entered into with the Bristol and Exeter Railway Company, and, at the first general meeting, it was announced by the directors, that a lease of their line to that Company was then in course of preparation, to which announcement the shareholders did not then object; but, in consequence of a change in the persons who held the shares of the Company, the South-western Railway Company obtained a preponderating influence in the Company, and, by their means, the draft lease was never approved by the Company; and at a special general meeting, held on the 11th January 1847, when a motion for the adoption of the lease was made by the chairman, it was rejected by a majority of the votes, and a resolution was passed that a proposition, which had been made by the Taw Vale Railway and Dock Company, should be adopted.

At the third half-yearly meeting of the Company, the directors presented a report, refusing to comply with the wishes of the majority of the shareholders as to the lease of

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the line to the Taw Vale Railway Company; and the chairman, under protest of the mover, refused to put a motion to the effect that any treaty with the Bristol and Exeter and Great Western Companies would be incompatible with the interest of the plaintiffs' railway. At the same time three directors of the Taw Vale Company were elected in the place of three who retired from the direction of the plaintiffs' company.

On the 2nd of March a requisition, signed by more than forty shareholders, was presented to the directors, requiring them to call an extraordinary meeting, "for the purpose of taking into consideration the expediency of restraining the directors from opening the line on the gauge then intended and partially laid down, or taking any further steps towards completing the connexion of the Exeter and Crediton with the Bristol and Exeter Railway, and, if it should seem expedient so to restrain the directors, then to take such steps as might effectually carry out such objects."

In consequence of a resolution of the majority of the shareholders, the present bill was filed by the three new directors, which, after stating the foregoing facts, and alleging that the other directors intended to open the line in co-operation with, and for the interest and advantage of, the Bristol and Exeter Railway Company, and so as to prevent any arrangement with the Taw Vale or any other railway on the narrow gauge, and that it was the desire of the majority of the shareholders to enter into an agreement with the last-mentioned Company, prayed that the defendants might be restrained by an injunction to the effect hereinbefore stated.

The defendants put in their answer on the 5th of May, which was to the effect, that the original intention of the promoters and of the legislature was, that the railway should be made on the broad gauge, and in connexion with the Bristol and Exeter line; that up to the 9th of December, 1846, the shareholders had been in favour of the proposed

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lease, and sanctioned the negotiations of the directors with the Bristol and Exeter Company; that the present opposition to the proposed amalgamation with the Bristol and Exeter arose from a desire on the part of the South-western Railway Company to extend their line into Devonshire, and, having failed in obtaining their object by application to Parliament, they were now endeavouring to become purchasers of lines of railway running into that county, so as to carry out their views without the sanction of the legislature; and that they had, through the directors of the Taw Vale Company, expended very large sums of money in the purchase of shares in the Exeter and Crediton Company, so as to obtain a control, without legislative authority, over the two last-mentioned Companies; and the majority of the shares and votes in the Exeter and Crediton Railway were now in the hands of the South-western Railway Company; and that the proceedings at the meetings held on the 11th of January were subject to their control and influence.

On the 5th of April, 1847, an injunction was granted ex parte in the terms of the prayer of the bill.

A motion was now made that the bill might be taken off the file.

Mr. *Rolt*, Mr. *Chandless*, and Mr. *Follett*, in support of the motion, produced affidavits, stating that the bill had been filed without the authority of the persons by law entitled to represent the Company, and therefore without the sanction of the Company; that the real interests of the Company were to carry out the views of the original promoters, under whose sanction and approval the line was already laid down in part with the broad gauge, so as to effect a junction with the Bristol and Exeter line, as originally contemplated by Parliament; and they contended that the meeting at which it was pretended that the resolution to file the present bill was made, was not a legal meeting, no notice having been given to the seven directors to

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attend; and although the General Companies Act restricted directors from giving their vote in respect of a contract with another joint-stock company, yet it did not contemplate that they should be excluded from the meeting or from seeing that it was legally convened. The objects of this bill were not confined to preventing the directors from completing the contract with the Bristol and Exeter Company, but from doing other acts which they were clearly empowered to do by legislative authority.

Mr. *Bethell*, Mr. *J. Parker*, and Mr. *Hardy*, contrà, relied on affidavits, stating that the bill was filed on the authority of three of the directors, in consequence of a resolution, made at an extraordinary meeting, held on the 12th of April, pursuant to notice, at which the chairman of the Company was present, but who left the meeting before anything was done; and that the chairman took away and retained the seal of the Company, which prevented the plaintiffs from affixing the seal to the written authority given to the solicitors to file the present bill; and they contended that the defendants, by putting in their answer, had admitted, and were not now in a position to dispute, that authority. The General Railway Companies Act subjected the directors to the control of the shareholders, and, if they disregarded the resolutions made at general meetings, the shareholders had a right to file a bill and to restrain the recusant directors from doing anything contrary to such resolutions.

Mr. *Rolt* replied.

The VICE-CHANCELLOR.—Nothing can be more plain on these affidavits than that the seven gentlemen, whom I will call by way of distinction the seven directors, as opposed to the three under whose authority it must be understood this bill was filed, determined to act in opposition to the avowed declaration of the majority of the shareholders.

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It is an extremely difficult thing to do justice to what is called a company, if you are to consider a company as a metaphysical thing, having, according to the description given of it by Lord *Coke*, neither soul nor body; and so it must be if you do not allow that a company must be taken to be identified with the majority of the shareholders. Laying aside the metaphysical and technical reasoning, which plays about the understanding without really affecting the interests of the parties concerned, it is of great importance that it should be made out that the present case is one in which the question really is, whether seven of the directors, for the purpose of effecting certain views which they entertain, and which are not at all inseparable from the interests of a company different from this, and of which they are directors, shall be at liberty to proceed in such a manner as to disappoint the avowed declaration of opinion of the majority of the shareholders of this Company; and, as it appears to me that there is some difficulty about the transaction, I have no objection, if the parties themselves do not object, to allow this matter to stand over until a general meeting has been called, so that the sense of the shareholders may be taken on the question, whether the bill shall continue on the file or not; and for this purpose I direct that this motion stand over for eight weeks, in order that the shareholders may, if they please, call a general meeting and determine on what is the course which, in their view, should be taken with respect to the bill.

May 28th. The defendants renewed their motion, by way of appeal from this decision, before the Lord Chancellor.

The case was argued by the same counsel as in the court below.

The LORD CHANCELLOR.—This is the case of a bill, filed in the name of a railway company as a corporation. A motion is now made by some persons, assuming to act as

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the Company, and in the name of the Company, to take the bill off the file, on the ground that the suit has been instituted without the authority of the Company. The question, then, is, who is to be considered the corporate body? Both parties represent themselves as filling that character; and the first point is, do the defendants represent the Company, and are they entitled to make this motion in the name of the Company? This might become a material question in some views of other parts of this case; but, in the view which I now take of the matter, it is not necessary for me to consider it. I find the position of the parties to be this: the plaintiffs, being a majority of the directors, have powers to exercise on behalf of the Company, and, by the provisions of the general act, the exercise of their powers is to be under the control and regulation of any general meeting specially convened for the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by such general meeting. This is an important provision as regards the exercise of the powers; for, thus, while all powers are subjected to the control of a general meeting, acts done prior to a resolution passed, are not to be interfered with. From this it follows, that the power of controlling the exercise of the powers of the directors, acting against the wishes of the general body of the shareholders, might be null; for the directors might do some act injurious to the Company, which could not be interfered with, except when such interference would be of no avail. If, then, such an act was in contemplation, and the shareholders wished to restrain it, unless the Court did what has been done here, no effectual interference could take place, and the directors would have it in their power to do any act they wished.

Applying these remarks to the present case, I here find an act about to be done which is disapproved of by many of the shareholders; and I find it is also stated that the bill has been filed with the approbation of the majority of the shareholders. The directors, contemplating to act as I have

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stated, adopted this course: the seal being in the custody of the secretary of the Company, one of these parties obtains possession of it from the secretary, so as to prevent the body of shareholders at large from getting it; he then comes to the meeting, various proceedings take place, and a resolution is passed, against his view and against the view of those acting with him. He has, however, the seal in his possession, and is applied to for it, and it appears that it was not produced. Then comes the resolution (the first resolution having been carried unanimously, with one exception). The affidavit states it thus:—"It was moved and seconded that the directors be restrained from opening the Exeter and Crediton Railway on the gauge at present contemplated and partially laid down, and from incurring any further expense, or taking any further steps in or towards the completing the connexion of the said Exeter and Crediton Railway with the Bristol and Exeter Railway at Cowley Bridge; and such resolution was put to the meeting and carried unanimously; and thereupon it was moved by Mr. Blake, and seconded by Mr. Batchelor, both of whom were and are shareholders in the said Company, that the secretary of the Company be required to attend to the instructions of the present directors (naming them), and to render his assistance in carrying the foregoing resolutions into effect, and to furnish the directors, or either of them, with copies of all minutes or other documents which they may require from time to time for effecting the foregoing object." This statement is uncontradicted, and thus there is an almost unanimous wish that an act contemplated by the directors should not take place. The meeting endeavoured to control the doing of this act, as they had a right to do.

It is, however, said, that there is no seal affixed, and that there is no retainer for the filing of the bill; but though this is so, there is a resolution which could be carried into effect by no other mode except by filing a bill. If filing a bill was necessary to prevent the directors from doing what

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they contemplated, this resolution gave power to file the bill. The question therefore is, when a representation is now made by the defendants, stating that they are the corporation, and seeking to stay this proceeding, am I to interfere without first giving the corporation an opportunity of stating whether they give their assent or not to the proceeding? In so doing, I should not only be creating great difficulty and doing an act of injustice, but I should be laying down a very absurd rule. Who may be the parties representing the corporation, is quite an immaterial matter, as the shareholders have the power of controlling any act of those representing them. The reason, also, why there is an apparent irregularity in the present proceeding is, that the defendants themselves have prevented the possibility of the necessary sanction being given. All that the Vice-Chancellor has done, is with the view of ascertaining whether the Company do or do not sanction the present suit. They could not do so at the meeting of the 12th of April, the seal being withdrawn. The Vice-Chancellor has said, "Let the bill stand till I see whether it will or will not be sanctioned by the Company." He has therefore made the order in question, which appears to me to be right, and the present motion must be dismissed with costs.

[His Lordship, after some discussion as to who should bear the costs, gave liberty to any of the parties to make such application as to costs as they might be advised.]

June 7th, 8th, & 9th.

The defendants now moved, before the Vice-Chancellor of England, to have the injunction, obtained ex parte against them, dissolved. The same counsel appeared for the plaintiffs and defendants as on the argument of the motion to take the bill off the file.

The VICE-CHANCELLOR.—I cannot but think that the injunction ought to be continued. The matter stands in this way: it is certainly proved, that, before the Company

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was formed by act of Parliament, the gentlemen who were likely to become constituent members of it had it in contemplation to deal with the railway in a given manner, and it appears that the same intention was manifested after the Company was formed; but there was nothing whatever, that I can see, in the act of Parliament, which at all forbids the majority of shareholders, when they were assembled at their extraordinary meeting, from changing their plan as to any mode in which they would conduct the affairs of the Company; and, therefore, it appears to me that there was nothing in the act of Parliament, or in the general constitution of the Company, as established by any of the general acts, which prevented the shareholders, upon the 11th of January, from coming to that resolution. That entirely displaced, as I understand it, any sort of claim which the Bristol and Exeter Railway Company might have had to take a lease, or to have an amalgamation with the Exeter and Crediton Railway Company. Then the matter was carried still further, in the way of departure from the original scheme of leasing to the Bristol and Exeter Railway Company, by the resolution which was come to at the extraordinary general meeting of the 17th of February, because that resolution, as I understand it, was to grant a lease to the Taw Vale Railway Company. So the matter stood, and the bill was filed upon the allegation that the directors were going to do something which was entirely inconsistent with the existence and the spirit of those two general resolutions.

Now, that the Company had a right to do so, in the abstract, I think cannot be doubted; and it does not appear to me, that what has been attempted to be inferred from the decision of the Court of Queen's Bench in *Reg.* v. *Eastern Counties Railway Company* (*a*) has any application to the present case; because there, as I understand it, the act of Parliament had directed that the railway should be made

(*a*) Ante, Vol. 1, p. 509.

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from one place to another; and the question was, whether, where the minority wished that the act should be complied with, and the majority wished that the act should not be complied with, there should not be a mandamus to the Company to do that which the act had directed to be done; and whether that was made upon the application of a small minority, or of a great majority, or of a single individual, appears to me to be quite immaterial, because all that the Court of Queen's Bench did, was, as I understand it, to direct that the Company should do what Parliament had said they should do.

That appears to me to have no analogy to the present case, which really in the abstract is nothing more than this, that the majority of the shareholders have changed their view, although expenses, to a certain extent, have been incurred by proceeding in a given line. This has actually happened to one Company of whose affairs I know something, (and that it must have frequently happened appears from the acts of Parliament, which are constantly passing as to other Companies), that the Company have come to a resolution to make an application to Parliament for a departure from the very line which they had at first authority to make under their act of Parliament.

It would be a strange thing to say, that because at the general meeting the majority were of opinion there should be a departure from the course which they had been carrying on for some time and at some expense, that that opinion should not be complied with merely because the minority objected. It appears to me that it is incidental to the affairs of a company, such as this is, that there may be schemes, begun and carried on for a certain time and at considerable expense, which, after all, with the greatest propriety may be abandoned.

The objection made to that view of the case is this: it is said that the majorities which were procured at the meetings of the 11th and 17th of February, were majorities

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illegally constituted, because the persons who voted and so made the majority were persons who had sold their shares virtually, and, in common parlance, to the South-western Railway Company. But I see nothing whatever upon the face of the act which prevents the shareholders of the Exeter and Crediton Railway Company in the abstract from selling their shares to any individuals. All the transferees of shares, immediately upon having their names entered according to the provisions of the general act, became shareholders in the place of the original shareholders; and there is nothing, as it appears to me, in the sale of the shares, so far as the vendor or the purchaser is concerned, that would prevent the Court from clothing the purchaser with all the rights he would have by law.

But then it is said, that these purchases have been made by means of money belonging to the South-western Company, which money ought not to have been so applied. Now if that is the case it does not sufficiently appear, for I have nothing whatever to shew me out of what particular sources the money had arisen, or what was the particular law affecting the money which the South-western Railway Company might possess. That case is stated in a general way, but there is no particular statement of facts which enables me to judge of it; and I cannot but think, that, generally speaking, the owners of the shares at a given time had a right to sell their shares to any other persons, and that those other persons, when they did become shareholders, had all the same rights vested in them that they would have had if they had originally been shareholders.

Then it is said, that the directors may lawfully do that which the injunction attempts to restrain them from doing, because there has not been a resolution in express words, that the thing shall not be done; but I must think, that, if the effect of doing the act which the injunction seeks to restrain the directors from doing will plainly be to prevent for ever the accomplishment of those things which

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the resolutions of January and February have pointed out, the Court is bound to attend to the manifest wish of the majority.

I put out of consideration, for the present, what has been stated about the resolution carried on the 12th of April; upon the answer, it is almost impossible to make it out. All that is said is, that the meeting was exceedingly irregular and disorderly, and that certain things were done, which are stated in such general language that I was not able to define what they were. It appears to me, that whatever did take place, the answer has not given a clear account of it, and I must put it out of consideration. But my opinion is, that if the effect of opening this railway would be to fix it in perpetuity with the character of a broad-gauge railway, that is so directly inconsistent with the resolutions that have been actually come to, that this Court ought at least to keep that question open, so that it may hereafter be determined whether or not the whole course of conduct which has been adopted by the new shareholders, constituting the majority, shall or shall not be carried into execution.

Now, that is really the whole of this case. It does not appear to me necessary to spell any particular parts of the injunction, for they all stand or fall by the general principle. My opinion is, that I am bound to keep things in such a state, that, if the decision at the hearing shall be in one way, that decision may have the chance of being carried into effect.

This motion must be refused, with costs.

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COURT OF REVIEW.

BEFORE THE CHIEF JUDGE.

July 12th & 14th.

Ex parte MORRISON, Re THE LONDON AND BIRMINGHAM EXTENSION RAILWAY COMPANY.

Under the 9 & 10 Vict. a meeting was called of the members of a projected railway company, who had failed in obtaining an act, and, at such meeting, it was resolved that the Company be dissolved, but that such dissolution should not be an act of bankruptcy. Three of the committee of management afterwards met, and signed a declaration of bankruptcy, upon which a fiat issued against the Company. Two others of the committee then presented a petition to the Court of Review to annul the fiat, but did not serve any of the members:—*Held*, that some of the members who dissented from the views taken by the petitioners must be served with the petition.

That, as a provision of the subscribers' agreement required that five members should be present to form a quorum, the unanimous vote of three only did not satisfy the requisitions of the acts of the 7th and 8th, and the 9th & 10th Vict.; and the fiat was annulled accordingly.

THIS was a petition, presented by two of the members of the committee of management of the above-named projected Company, praying that a fiat, which had been issued in bankruptcy against the Company, might be annulled.

The petition stated the formation and registration of the projected Company, and that an agreement had been subscribed by the members of the Company, which contained, amongst others, the following clause:—"And it is hereby declared, that the majority of the members of the committee of management for the time being, being present as members of such committee, consisting of not less than five members, shall have power to bind all who are absent, as well as those present, as well as the general body of the subscribers."

The promoters having failed to comply with the Standing Orders of the House of Commons, could not obtain their act; and differences of opinion having arisen between the subscribers to the undertaking, a meeting was convened, on the 10th of September, 1846, under the Act to facilitate the Dissolution of certain Railway Companies, (9 & 10 Vict. c. 28 (*a*)); and a resolution was passed, "That the Company

(*a*) Sect. 2. "That it shall be lawful for the committee, provisional directors, or other persons by such contract or agreement as aforesaid intrusted with the management and carrying into

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be dissolved, but that such dissolution shall not be an act of bankruptcy."

In March of the following year a meeting was held of three of the directors, at the office of certain solicitors, then recently appointed, and it was unanimously resolved at such meeting, "That the Company was unable to meet its engagements;" and the chairman signed a declaration to that effect, in the form required by the 7 & 8 Vict. c. 3 (*a*), which declaration was duly attested; and the resolution and declaration having been filed at the office of the Secretary of Bankrupts, a fiat was issued on the 18th of May.

June 30th.

On this day the petition was presented.

Mr. *Russell* and Mr. *Hawkes*, on behalf of the petitioning creditors and official assignee, objected that none of the dissentient members of the committee of management had been served with the petition.

Mr. *Bacon* and Mr. *Glasse*, for the petitioners, contended,

effect of the undertaking, and who are hereinafter called the committee, to call a meeting of the shareholders for the purpose of determining whether the partnership or company so as aforesaid intended to be formed (and which is hereinafter called the Company) shall be dissolved, and that, if such meeting shall determine, as after mentioned, that the Company shall be dissolved, then, as from the date of the resolution come to at such meeting, the Company shall be taken to be dissolved, and the committee shall not have power to proceed any further with the undertaking."

(*a*) The 4th section of the 7 & 8 Vict. c. 3, provides, "That if any such company or body shall, by virtue of a resolution to be duly passed in that behalf at a board of directors of such company or body duly summoned for that purpose, file or cause to be filed in the office of the Lord Chancellor's Secretary of Bankrupts a declaration in writing, in the form specified in the Schedule (A.), No. 1, hereunto annexed, that the said company or body is unable to meet its engagements, and also a minute of such resolution in the form specified in the said Schedule (A.), No. 2, such declaration and minute of resolution respectively being un-

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that, under the construction of the act of 9 & 10 Vict., such service was unnecessary; that the Company was *ipso facto* dissolved by the resolution of the 10th of September; and that the resolution then come to, with respect to the question of dissolution or bankruptcy, precluded every member from afterwards taking proceedings to issue a fiat against the Company.

Mr. *Russell* contended, that, under the 27th and 28th sections (*a*) of the 9 & 10 Vict., the proceedings of the three directors were sufficient to support the fiat in bankruptcy.

der the common seal of such company or body, and if such company or body have no common seal, then signed by the chairman of the board of directors who was present at the passing of such resolution, and in either case such declaration and minute of resolution being respectively attested by the attorney or solicitor of the said company or body for the time being, every such company or body shall be deemed thereby to have committed an act of bankruptcy at the time of filing such declaration, provided a fiat in bankruptcy shall issue against such company or body within two calendar months from the filing of such declaration; and a copy of such declaration and minute of resolution respectively, purporting to be certified by the said secretary or his clerk as a true copy, shall be received as evidence of such declaration and minute of resolution respectively having been filed by such company or body; and that upon such evidence being given, and upon proof of the attesting witness of the sealing or signature, as the case may be, of the said declaration and minute of resolution, no further evidence shall be required of the said act of bankruptcy."

(*a*) The 27th section is as follows:—"That it shall be lawful for any three of those who were of the committee of any company so dissolved, at any time after the dissolution thereof shall have been resolved, or for any creditor or creditors of such company within three months after the dissolution thereof shall have been resolved, to petition that a fiat in bankruptcy may issue against such company."

The 28th section provides, "That upon the production of a copy of the London Gazette containing the resolution of any such meeting as aforesaid, whereby it shall be resolved that the dissolution of the company shall be an act of bankruptcy, or upon the petition of any three of the

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The CHIEF JUDGE.—The petitioners are only two out of a number of twelve or fourteen persons, who, at the time when I understand the Company was dissolved, viz. in September last, were its managing or governing body, that is, its directors or committee of management. This state of things is, as I understand it, admitted; and it is further admitted, that not one of those twelve or fourteen persons, who dissent from the view taken by the petitioners, has been served with this petition. Some of these persons are within the jurisdiction, and the Court requires that some substantial person or persons, in *pari conditione* with the petitioners, but taking a different view of the matter, should be served.

[The order directed that the proceedings under the fiat should be stayed, and that three of the directors, resident in England, who dissented from the views of the petitioners, should be served with the petition.]

July 12th.

On this day the petition came on again for hearing, three of the members of the former committee of management of the Company, who were opposed to the prayer of the petition, having in the meantime been served.

Mr. *Bacon* and Mr. *Glasse*, for the petitioners, proceeded to argue three objections, taken by them, to the existence of the fiat: first, that the company in question was not such a company as came within the meaning and provisions of the 7th & 8th of the Queen; secondly, that no sufficient act of bankruptcy, on which to support a fiat, had been committed; and, thirdly, that there was no debt.

committee as aforesaid, or of any creditor under the last preceding clause, a fiat in bankruptcy shall issue against such company, and the company shall thereupon be deemed to be within the provisions of an act passed in the 7th and 8th years of the reign of her present Majesty, in all respects as if a fiat in bankruptcy had issued against it under the said act before its dissolution."

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The Chief Judge, however, intimated that he wished the respondents to shew, that, having regard to the terms of the subscription contract, the meeting of the three directors and the resolution passed by them were a sufficient compliance with the requisitions of the acts of Parliament.

Mr. *Russell* and Mr. *Hawkes* contended, as to this point, that, although under the terms of the subscribers' contract it was necessary that five members should be present to form a quorum, in order to bind the Company, yet the majority of votes would prevail, and the unanimous vote of three was sufficient, as they must necessarily form the majority of five.

Mr. *Morris*, on behalf of the chairman of the three directors who passed the resolution and signed the declaration of bankruptcy, contended, that the petitioners had an opportunity of attending the meeting, and that they could not now be heard to question the legality of it; that the proceedings ought to be considered as to have been taken under the act of the 9th and 10th, and not under that of the 7th and 8th of the Queen; that in the former act it was not necessary that five members of the committee should be present, but all that was required was, that a meeting should be called, and a resolution passed, that the company be dissolved; that the 27th section then came into force, and, under it, any three of those who were of the committee of any company so dissolved, could petition that a fiat in bankruptcy should issue against the company.

The CHIEF JUDGE (without hearing a reply).—Of course, I think it perfectly competent to the petitioners in this case to present a petition. I cannot imagine how it would be possible to decide otherwise, and leave the petitioners subject to the liabilities to which they are exposed by the act

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of Parliament. The next question is, having assumed everything to be in favour of these petitioners, whether the declaration filed in the office of the Secretary of Bankrupts, which is the foundation of the fiat, was filed "by virtue of a resolution duly passed in that behalf at a board of directors of such company, or body, duly summoned for that purpose?" If it were not, the fiat must fail, whether exposed or not exposed to any other objections.

Now, with regard to this, it has been said, that the act of the 7 & 8 Vict. makes that which has taken place conclusive evidence that the declaration was filed by virtue of such a resolution. I am not of that opinion. The 4th section (*a*) makes certain matters receivable as *primâ facie* evidence of the requisites which it mentions, but it does not make them conclusive evidence. It does not take away from any interested party the power of contesting it, and he has the opportunity of shewing, by other evidence, that such a state of things did not exist. The main question upon this point of the case is, whether that has been shewn or not? Now, by an instrument not produced, the absence of which, however, is, I conceive, sufficiently accounted for, and the contents are, in my judgment, sufficiently proved, a number of persons, considerably exceeding five, were appointed to be the general committee of management for prosecuting the undertaking, and various powers were given to that committee, and various acts, which they were to do, were mentioned; and, until we come to the clause to which I am about to refer, I do not understand that the instrument gives any power to any one or more of that number to bind the rest, or to act without the rest. There is, however, this clause: "and it is hereby declared, that the majority of the members of the committee of management for the time being, being present as members of such committee, consisting of not less than five members, shall have power to bind all who are absent

(*a*) Page 225, ante.

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as well as those present, as well as the general body of the subscribers."

Now, when the act was done, the validity of which is here in question, there were certainly more than five members of the committee who not only were capable of being summoned, but were actually summoned, and could have attended. In point of fact, however, only three of them did attend; and the three did the act, or professed and attempted to do the act. And as they were unanimous, it has been contended, that, inasmuch as five might, if present together, have effectually done the act by means of the majority of three, notwithstanding the dissent of the two, and that that number of three was here present doing the act unanimously, it was sufficient.

I am perfectly certain, that, in this case, and in analogous cases, the unanimous act of the three being alone is importantly different from the act of the three being a majority of five, who act in the presence of the other two, delivering or capable of delivering their reasons, and of arguing the point with them. It appears to me, therefore, that it is no answer to say, that, if five were present, the three might have done the act. The five were not present. I am of opinion, that if any sufficient reason could have been given, none has been given, for a meeting of the three only,—that is, a meeting for any effectual purpose of the three only. I think, that, for any purpose material at present, under the circumstances at least which existed (for it is not necessary to consider any other probable state of circumstances), a meeting consisting of less than five members could not do this or any such act. I am of opinion, therefore, that it is proved that the declaration in writing, which is the foundation of the present fiat, was not filed "by virtue of a resolution duly passed in that behalf at a board of directors," and that, consequently, the fiat fails.

The petitioning creditor must pay the costs of the petitioners.

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HOUSE OF LORDS.

THE NORTH BRITISH RAILWAY COMPANY, Appellants; WILLIAM HORNE, Sheriff-depute of Haddington, N. B., Respondent.

July 14th.

THIS was an appeal from the Court of Session in Scotland, which had refused to grant an interdict to the above-named Railway Company, in the terms and under the circumstances hereafter mentioned.

The appellants were incorporated by act of Parliament, (7 & 8 Vict. c. lxvi), and empowered to construct a railway from Berwick to Edinburgh.

Under parliamentary regulations, the railway was inspected by an official, appointed by government, and by him reported to be completed for the purposes of public traffic; and, on his report being duly made to the Board of Trade, it was opened to the public on the 22nd of June, 1846, and has ever since been used for public traffic.

By section 292 of the act constituting the Company, it was provided as follows:—"That it shall be lawful for the sheriff of any county in which the works of the said railway shall be in progress of construction, and he is hereby required, upon the application of the said Company, or of any two justices of the peace of the district in and through which the railway may be in course of construction as aforesaid, to appoint from time to time such fit and proper persons as he shall think proper, or as the said company, or any three of the directors thereof, may nominate to him for that purpose, to be special constables within the limits of

Under the provisions of an act of Parliament incorporating a railway company, it was provided, that it should be lawful "for the sheriff of any county in which the works of the said railway shall be in progress of construction," to appoint constables, &c. "during the construction of the said railway and works." Constables were duly appointed, whose wages were paid by the Company up to the time when the railway was opened, with the sanction of the Board of Trade, for public traffic.

After the opening of the railway, a considerable number of workmen continued to be employed, but

the Railway Company refused to pay their wages, on the ground, that, upon the true construction of the act, the works of the railway were no longer "in progress of construction":—*Held*, by the House of Lords, on appeal from the Court of Session in Scotland, that the liability of the Company for the wages of the constables did not cease with the opening of the line, but continued so long as workmen were employed in completing any works on, or connected with, the railway.

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the said railway and other works, and within half a mile therefrom, during the construction of the said railway and works; and every person so appointed shall make a solemn declaration, to be administered by the sheriff, duly to execute the office of a constable, as hereinafter mentioned; and every person so appointed, having made such declaration, shall have full power to act as constable for the preservation of the peace, and for the security of persons and property against felonies and other unlawful acts within the limits aforesaid, and in the county or district in which he shall be so appointed; and shall have, use, exercise, and enjoy all such powers, authorities, protections, and privileges in the execution of his office, as belong by law to the office of constable in the district in which he is appointed to act; and it shall be lawful for the sheriff to dismiss or remove any such constable as may have been so appointed by him from the office of constable, and to appoint another fit and proper person in his stead; and upon every such dismissal or removal, all the powers, authorities, protections, and privileges vested, by virtue of such appointment, in any person so dismissed or removed, shall wholly cease; and every person so appointed by the sheriff shall, during such time as he shall act as constable, receive from the Company such reasonable remuneration as is in use to be given to constables on duty within the county, payable at such times and in such manner as the sheriff shall appoint."

On the 3rd of September, 1844, an application was made by two justices of the peace of the county of Haddington to the sheriff of that county, to appoint constables, "in consequence of the commencement of the railway works in the eastern district of the said county, and in terms of the North British Railway Act, 7 & 8 Vict. c. lxvi, s. 292."

The sheriff, upon this application, appointed constables from time to time, and the Company paid their wages up to the 19th of August, 1846.

By an act, passed in the 8th & 9th Vict. c. 3, (18th

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March, 1845), reciting that great mischiefs had arisen by the violent and unlawful behaviour of labourers and others employed in the construction of railways and other public works in Scotland, by reason whereof the appointment of additional constables or officers for keeping the peace, and for the protection of the inhabitants and security of the property in the neighbourhood of such public works, was often necessary, it was enacted, that, from and after the passing of that act, it should be lawful for the sheriff of any county in which the works of any railway, canal, or other public work of a similar nature should be in progress of construction, upon the application of the company, or other parties carrying on any such public work, or of any two justices of the peace of the county, and usually acting in the district in or through which any such public work might be in course of construction, to appoint from time to time such fit and proper persons as he might think fit to nominate for that purpose, to be constables or peace-officers in and for such county, within the limits of such public works, and within a mile therefrom, during the construction of such public works. Provision was made, by the 2nd section of this act, for the payment of parties employed by the Company, and, by the 3rd, for the levy of their wages.

On the 13th of August, 1846, after the railway had been opened and was in operation, a communication was made to the respondent, Mr. Horne, as sheriff of the county, on the part of the Company, to the effect, that the period during which the Company were liable for the support of any such constables had expired, and that the sheriff should direct the railway constables to be discontinued; and it was stated in support of this application, that, except the masons and joiners engaged in building stations, all the parties then in the employment of the Company were the ordinary complement necessary for the purpose of keeping up and repairing the line.

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The sheriff having declined to act upon this request of the Company, the Company intimated to the sheriff that they would pay the wages of the constables up to the 19th of August, but not after that time.

It was admitted that the constables appointed by the sheriff did not at any time exceed fourteen, and that that number was gradually reduced; so that, on the 19th of August, when the appellants refused to pay further wages, there were only three remaining on the line. That the number of workmen employed on the line in the county of Haddington alone, between the 19th of August and the 22nd of November, varied from 426 to 662.

The sheriff, upon this refusal on the part of the Company, issued his precept or warrant, in the following terms, for raising the wages due to the constables appointed by him:—"That, whereas it has been represented to the sheriff, by the sheriff-substitute, the procurator-fiscal, and the general superintendent of police of the county, that the directors of the North British Railway Company have, from the 19th day of August, refused to pay the wages of the constables employed by authority of the sheriff under their railway act, and also under the act of the 8th & 9th of Victoria, cap. 3; and whereas a similar refusal to pay has, in like manner, been intimated to the sheriff officially by the directors of the North British Railway Company through their secretary, and a requisition made by the said secretary to him to discharge the constables still employed upon the line; and whereas the sheriff has been, and is of opinion, that he would not, in the circumstances which have existed, and continue to exist, be warranted in reducing that force farther than has been already done, and that he is thereby called upon to exercise his supposed power with which he is entrusted by the said acts of Parliament, and, in particular, by the 8th & 9th Victoria, c. 3, s. 3; and upon the further narrative of their continued refusal to pay, grants warrant for poinding and distraining

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the goods and effects belonging to the said Company within this county, and for keeping and detaining the said goods and effects for the space of four days, liable to the payment of the said wages due to the said constables by the said Company, amounting to 4*l.* 8*s.* 4*d.*, and the costs incurred in levying the same, unless the said Company shall redeem the same within the said space by payment. And, further, hereby grants warrant, payment not having been made after the expiration of the said four days, for valuing and appraising the said goods and effects by two duly qualified persons, and selling and disposing of as much of the same as will satisfy the said wages and costs; said sale to be conducted by the clerk of court." The Company then applied to the Lords of Council and Session in Scotland, for suspension and interdict against the respondent, to prevent him from selling the articles pointed by virtue of his warrant.

In the proceedings, objections were taken by the appellants as to the form of the poindings, and the Court held the formal objections to be well founded, but refused the interdict so far as it was presented on the ground stated in the second plea in law, that the railway was not in the course of construction, and that the provisions of the statute referred to were not applicable after the sanction of the Board of Trade was obtained to the opening of the railway for public traffic.

Against this interlocutor, so far as it refused that part of the note of suspension, which was presented on the ground that the railway was not in the course of construction, and that the provisions of the statute were not applicable after the sanction of the Board of Trade had been obtained to the opening of the railway for public traffic, the appellants brought the case before the House of Lords, founding their hope that it might be altered or reversed, for the following reasons:—

1st. The judgment of the Court of Session was informal and erroneous, on the merits, as fixing a liability upon the

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appellants for the support of constables after the railway ceased to be in progress of construction, when their statutory liability had ceased; secondly, it was necessary to construe the statute as limiting the duration of liability to the opening of the line, because, otherwise, the obligation, contrary to the plain meaning of the act, would be virtually perpetual; thirdly, the reasons assigned, in the opinions of the Lord Ordinary and the Court, for refusing the note, in so far as regards the plea founded on the expiry of the period fixed by statute, were insufficient.

The Lord Ordinary, by his note, said, "The actual line of the railway may be finished, although the works are still in progress. There are now actually employed in the works several hundred persons, whose services will not be required when the works are finished;" and, after adverting to the fact, that a number of persons were actually employed in the "works whose services will not be required when the works are finished," asks what it can signify that "masons chiefly, and labourers, at the station-houses, and not persons digging the line of the rails, are engaged?" "The act," he says, "makes no such distinction."

The respondents supported their case by the following reasons:—That, under the provisions in the act of Parliament incorporating the North British Railway Company, and of the general act 8 & 9 Vict. c. 3, it was clear, that, in so far as these provisions related to the appointment and employment of constables, the meaning and intent of the legislature was to protect the public peace from the evils and perils incident to the employment of numerous labourers on the works of the railway. That labourers might be of different descriptions, employed in different varieties of work; but if numerous, and engaged in constructing any part of the work for carrying out the undertaking, they were, whatever their employment, the very class of persons in respect of whom the provisions for the appointment of constables appeared to have been enacted; and that to per-

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mit the Railway Company to employ on their work a numerous body of labourers of any description, free from the inspection and restraint of constables, would be to frustrate the intent, and defeat the policy and purpose, of the statutes. That, under the circumstances of this case, the occasion and necessity for the employment of constables still continued. That at the date of the appointment, and during the whole continuance of the employment of these constables, the works of the North British Railway were "in progress of construction," according to the true meaning and import of these words. That the mere line of rails, with the cuttings and embankments, was a part, not the whole, of the works of a railway, and the construction of these was only a part of the construction of the works of a railway. In the act of Parliament, 3 & 4 Vict. c. xcvii, s. 16, for regulating the opening of railways, and inspection of the works by the Board of Trade, the expression, "stations or other works or premises," is used. That the mere fact that the railway had been opened for traffic, could not of itself relieve the appellants from the provisions of their act in regard to the appointment of constables; and the permission to open the railway granted by the Board of Trade had not the effect of discharging the provisions of the incorporating act, in which no reference was made to such permission.

Mr. *Bethell* and Mr. *J. R. Hope*, for the appellants.

Sir *F. Kelly* and Mr. *Anderson*, who appeared for the respondents, were not heard.

LORD CHANCELLOR.—My Lords, in this case I apprehend your Lordships will feel no doubt that the judgment must be for the respondent. It is plain, upon the construction of clause 292 of the act under which this railway was formed, that the decision of the Court below was correct. That provision is, that "It shall be lawful for the sheriff

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of any county in which the works of the said railway shall be in progress of construction, and he is hereby required, upon the application of the said Company, or of any two justices of the peace of the district in and through which the railway may be in course of construction as aforesaid, to appoint from time to time such fit and proper persons as he shall think proper, or as the said Company or any three of the directors thereof may nominate to him for that purpose, to be special constables within the limits of the said railway and other works, and within half a mile therefrom, during the construction of the said railway and works." There is no provision made for the cesser of that employment.

Now, my Lords, the Railway Company, the appellants, put their case entirely upon this, that the construction was completed, the railway having been opened under the authority of the 5th and 6th of the Queen, by which it is enacted, "That no railway or portion of any railway shall be opened for the public conveyance of passengers until six calendar months after the notice in writing of the intention of opening the same shall have been given by the company to whom such railway shall belong, to the Lords of the Committee of Her Majesty's Privy Council appointed for Trade and Foreign Plantations, and until ten days after notice in writing shall have been given by the said company to the Lords of the said Committee of the time when the said railway or portion of railway will be in their opinion sufficiently completed for the safe conveyance of passengers, and ready for inspection." Therefore all that the Committee of Council have to do, or that their inspector has to do, under that act, is to see that the works are sufficiently completed to ensure the safety of passengers. That accordingly was done, and then, because that was done, and therefore because the Committee of the Privy Council and their inspector came to the conclusion that the works were sufficiently completed for the safety of passengers, the Com-

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pany concluded that the railway and all the works were completed, those being the terms used in section 292.

Now, my Lords, we all know—not only your Lordships, but all mankind know—that railways are opened for the transit of carriages, whether for goods or passengers, long before the works of the railway are completed; but during the continuance of the construction of the works the sheriff has authority to appoint, and the Company are bound to pay for the expense of, extra constables. There is nothing whatever to shew that the time had expired within which, under the 292nd section, the public were to be protected against the workmen employed during the construction of the works; but, on the contrary, the words of the act are, that they are to continue protected "during the construction" of the works. There is no allegation, even on the part of the appellants, that all the works were completed; but there is a very distinct allegation, as, indeed, it necessarily follows from the facts that were stated, that the works were not completed, but that they were completed only so far as was necessary to secure safety to those who were travelling by the railway.

Under these circumstances, it appears clear that the Court of Session was right in saying, upon the construction of that section of the statute, that the liability of the Company had not ceased, the works not being completed, but being only so far complete as was necessary for the safety of those who travelled upon the railway. It only remains, therefore, for me to move your Lordships that the interlocutor appealed from be affirmed.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend. There are two stages in the construction of works of this character: the one being their entire completion, and the other their completion only so far as may admit of the conveyance of passengers or goods upon the railway with some degree of safety. In the latter case

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they are so far completed that there may be a part of the anticipated profit taken, which the company are very ready to take, and which they can very justly and very naturally do, upon obtaining the certificate of the Railway Board that the progress has been sufficient for that purpose. It is true that passengers have then to run some risk, though necessarily not so great as before. After the certificate is granted, they have merely a chance. Still they can go, if they choose, and they always do choose, because they have no other way of travelling—they have no election. They may, however, notwithstanding this, go on the railway at a time when a great part of the works are not completed, as appears to have been the case in this instance with respect to the station, which was only half completed; and, in fact, as it appears, there still remained a great many works which really were not completed.

My Lords, the effect of the certificate of the Railway Board is merely to shew that there is a chance of safety in travelling upon the line, and that it is so far fit; but it does not indicate that the necessity for protecting the public against the workmen employed in the construction of the line has ceased. The right to carry passengers depends very properly upon the issuing of that certificate; but it does not follow that the whole of the works are completed: very much the reverse. I have no doubt whatever that in this case the appeal ought to be dismissed.

Interlocutor affirmed, with costs.

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BEFORE THE VICE-CHANCELLOR OF ENGLAND AND THE LORD CHANCELLOR.

THE GREAT WESTERN RAILWAY COMPANY *v.* THE BIRMINGHAM AND OXFORD JUNCTION RAILWAY COMPANY and Others.

Nov. 6th, 8th, 9th, 10th, 11th, 12th, 19th, & 23rd.

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Feb. 9th.

THE proceedings in this suit were instituted in consequence of the judgment in *Mozley* v. *Alston*(*a*), by the Great Western Railway Company, praying that an agreement, entered into by them with the Birmingham and Oxford Railway Company, on the 12th November, 1846, might be specifically performed; and that it might be declared, that, subject to the payment by plaintiffs of the monies payable by them under such agreement, the Birmingham and Oxford Junction Railway Company were trustees of that undertaking for the plaintiffs, and were bound to complete the said undertaking; and also praying an injunction to restrain the last-mentioned Company from making or entering, or attempting to make or enter, into any agreement for the sale, lease, use, or occupation of their railway, with the London and North-western, or any other Company or amalgamate their lines, and that the directors of the Great Western Railway should have certain powers as to the manner of making the lines and controlling the expenditure. In consequence of the transfer of shares to persons not favourable to this agreement, resolutions were afterwards passed, by which it appeared that it was the desire of the majority of the then shareholders of the A. and B. Companies to repudiate the agreement with the Great Western Company, and they refused to make the application to Parliament, and to oppose it if made by the directors pursuant to the agreement.

The Great Western Railway Company then filed a bill for the specific performance of the agreement, and at the same time applied for an injunction to restrain the dissentient shareholders of the A. and B. Companies from entering into any agreement with any other Company, or doing any act in violation of their original agreement.

Held, by the Lord Chancellor, affirming the judgment of the Vice-Chancellor of England, that there was a sufficient case shewn by the bill to support it against a demurrer for want of equity.

That an agreement to apply to Parliament for powers to do something, not included in a particular act, is such an agreement as the Court will recognise to the extent of compelling the parties to keep matters *in statu quo* until the application to Parliament be made.

That an agreement, not in itself invalid, made by the majority of the shareholders, cannot be rescinded by resolutions passed by persons afterwards becoming shareholders, although they may then constitute the majority.

The Great Western Railway entered into an agreement with two other Companies, A. and B., (which agreement was sanctioned by three-fifths of the then shareholders of the A. and B. Companies), to purchase their lines, under a power of sale contained in their acts; and it was a term of that agreement, that the A. and B. Companies should apply to Parliament for powers to amal-

(*a*) Ante, Vol. 4, p. 636.

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person whatsoever, and from in any manner dealing with the said railway, or parting with, or disposing of, the monies, property, or effects thereof, except with the approbation of the plaintiffs, and from passing, acting upon, or giving effect to any resolution, or doing any other act for the purpose of preventing payment of a call of £5 per share, then in great part remaining unpaid; and from doing or omitting to do, or procuring the doing or omission of, any act, matter, or thing, the doing or omission whereof was or might be in violation of, or inconsistent with, the said agreement.

The bill stated, that, by the 68th section of the Birmingham and Oxford Junction Railway Act (9 & 10 Vict. c. cccxxxvii), that Company had power to let or lease the railway thereby authorised to be made, or any part thereof, to the plaintiffs, for such terms of years and on such conditions as might be mutually agreed on; and, by the 69th section, such railways were thenceforth to be and become amalgamated with the Great Western Railway; but, by the 70th section, it was provided, that no lease or sale of the said railway to the Great Western Railway Company should take effect until the tolls had been reduced to a scale not exceeding the tolls and charges which the Company thereby incorporated were authorised to take. By the 71st section, power was given to the Company to enter into contracts or agreements with the Great Western Railway Company, before the passing of their act.

That the promoters and directors of the Birmingham and Oxford, and of the Birmingham and Dudley Railway Company, thinking it expedient to amalgamate, at the first ordinary meetings of the respective Companies, proposed, and resolutions were passed, that the directors should be authorised and requested to apply to Parliament, in the next session, for an act to carry such amalgamation into effect, and also to give the Birmingham and Dudley Railway Company powers of selling and leasing their line to the Great Western Railway Company, which were not

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contained in their act, 9 & 10 Vict. c. cccxxxvi, and the directors were directed at once to negotiate with the Great Western Railway Company.

The directors of the Birmingham and Oxford, and of the Birmingham and Dudley Railway Companies, in consequence of these resolutions, entered into an agreement with the Great Western Railway Company, which was dated the 12th November, 1846, and was in the following terms:—"Heads of agreement entered into between the directors of the Great Western Railway Company and the directors of the Birmingham and Oxford, and of the Birmingham and Dudley Railway Companies, for the purchase of the said two lines by the Great Western Railway Company:—First, the capital of the said two Companies in shares to be considered as amalgamated and taken at £1,700,000, namely, £1,000,000 for the Birmingham and Oxford, and £700,000 for the Birmingham and Dudley. Secondly, the Great Western Railway Company agree to purchase, and the said Birmingham and Oxford Railway Company and the Birmingham and Dudley Railway Company agree to sell, the two undertakings, by payment of 10*l.* 5*s.* of premium on each share of £20, the said premium to become payable, under any circumstances, within six months after the completion and opening of the said lines from Fenny Compton and Stratford-on-Avon, through Birmingham, to the junction near Wolverhampton, and subject also to become due at an earlier period, as mentioned in the third clause, the said payment of 10*l.* 5*s.* and £20, and making together 30*l.* 5*s.* per share, being in full satisfaction for the whole undertakings, the Great Western Railway Company being subject to any debentures or other liabilities necessary for the completion of the said lines or works, and for the purchase of the Stratford-upon-Avon Canal. Thirdly, that if the railway shall not have been completed and open for use by or before the 1st of January, 1850, the premium of 10*l.* 5*s.* per share shall be considered due, on the 1st of July, 1850, to those proprietors of the

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said Companies who may have duly paid up the full amount of calls on their respective shares, and who have not been in arrear at any time for three months, and interest at £5 per cent. per annum shall become payable half-yearly by the Great Western Railway Company on the said premium of 10*l.* 5*s.*, from the said 1st of July, 1850, until the said premium shall be actually paid, which payment is not, under any circumstances, to be deferred beyond six months after the actual completion and opening of the said lines: provided that if the said Great Western Railway Company should think fit to require the opening and working of any portion of the line previous to the completion of the whole, and not otherwise, the same shall be opened and worked accordingly, if such portion of the line can be completed: and thereupon the said premium shall become payable six months after such partial opening, in the same manner as if the whole had been opened and worked; but it is expressly understood, that no interest shall be payable by the Great Western Railway Company on the premium in respect of any shares on which any calls shall have been in arrear during a period of three months from the day on which the call shall have been due and payable. Fourthly, that interest shall be payable to the proprietors of the Companies on all calls to be paid during the construction of the lines, at the rate of £5 per cent. per annum (instead of £4 per cent. per annum, as stated in the report made to the proprietors at the late general meeting), and that, in respect of any sums paid in anticipation of calls, interest at the rate of £4 per cent. per annum shall be allowed on so much as may not have been called and become due, and £5 per cent. shall be allowed to them upon so much of the said anticipated payments as shall from time to time become due by virtue of any calls, and the proprietors who may pay the full amount of their shares by anticipation, or who may have paid up the full amount of £20 per share by calls, shall be entitled to receive, from the Great Western Railway Com-

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pany, a coupon or other security binding the said Company to the holder thereof to repay the full amount of capital, together with the premium of 10*l.* 5*s.* per share and interest thereon, as hereinbefore stated, in the manner and subject to the conditions herein provided for. Fifthly, that any further capital required for the purposes of the said Company or for any other lines or works to be undertaken by or on their behalf, shall be found and advanced by the Great Western Railway Company, by creation of shares or otherwise, as is or may be authorised by Parliament. Sixthly, the Birmingham and Oxford, and Birmingham and Dudley Companies, are to be amalgamated, and powers taken for the broad gauge in addition to the narrow therein, and an arrangement is to be made for blending the Great Western Board with the directors of the amalgamated Companies, in such manner as to give the Great Western Railway Company an effectual control over the expenditure of the said Companies. Seventhly, in the event of any point being unprovided for in this memorandum, the same to be decided, in case of difference between the parties, by the Honourable J. C. Talbot. Eighthly, the terms and conditions of this agreement are to be submitted to special general meetings of the three Companies, to be convened with the least practicable delay, and, when ratified, all necessary powers are to be sought from Parliament to give effect to this agreement."

That, pursuant to notices, meetings of the shareholders of the three respective Companies were held on the 4th of December, 1846, whereat it was resolved, by the votes of the majority, consisting of more than three-fifths of the proprietors then present or by proxy, that the agreement of the 12th of November should be confirmed; and the corporate seals of the three Companies were thereupon affixed thereto.

That, on the 2nd of January following, the agreement was further carried out by an indenture of that date.

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The bill then stated that the consideration to be paid by the plaintiffs was more than the value of the two railways, if taken as distinct and independent Companies; and that they would not have agreed to give so large a consideration for them, except with the view of uniting them, whereby the value of both was greatly increased.

That, upon the faith of the agreement, plaintiffs had joined the Birmingham and Oxford Company in executing an indenture of agreement with certain contractors with reference to the construction of the Birmingham and Oxford line; and the Birmingham and Oxford Company had in the same deed covenanted with the plaintiffs that they would make and enforce such calls on their shareholders as they should be legally authorised to do, and would pay all sums payable to the contractors of works and for lands purchased for the purposes of the railway.

That an act for enabling the plaintiffs to purchase or amalgamate with the Birmingham and Dudley Railway Company, and further enacting that the agreement of the 12th of November should be binding on all parties, duly passed.

That such act recited that a bill was then pending before Parliament for uniting the Birmingham and Oxford with the Birmingham and Dudley Railway Company.

That the bill so referred to was promoted for the purpose of carrying out the terms of the agreement of the 12th of November; and although it had passed the House of Commons, it was thrown out in the House of Lords upon the Standing Orders.

The bill then charged that the said agreement was still valid and binding, as well on the plaintiffs as on the other Companies, and that the plaintiffs had always been ready and willing to perform their part of it.

That several calls had been duly made by the directors of the Birmingham and Oxford, in part performance of the

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agreement, but that a call for £5 per share, made on the 12th of June, 1847, had not been paid.

That a majority of the existing shareholders, consisting of persons who had become so since the date of the agreement, and being either directors or other officers or servants of, or shareholders in, the London and North Western Railway Company, acting in concert with certain of the directors of the Birmingham and Oxford Company, had taken upon themselves to repudiate the said agreement of the 12th of November, so as entirely to defeat the purposes of that agreement, and to prevent the payment of the amount of any calls already made from being enforced, and also to render it impossible to make any further calls.

The bill further charged that the Birmingham and Oxford Company threatened and intended to enter into some agreement with the London and North Western Company for the sale or lease to or other use by that Company of the Birmingham and Oxford Railway; and, in evidence of such intention, the bill charged, amongst other things, that, at a meeting held on the 13th of March, a resolution was passed, whereby the directors were instructed to entertain certain proposals which had been made to them by the chairman of the London and North Western, having for their object the joint use of the Birmingham and Oxford line by the Great Western and North Western Companies, and that failing, that the line be completed forthwith, and kept independent of either Company. And that at another meeting on the 24th of July following, it was resolved, that proceedings should be commenced at law and in equity for restraining the plaintiffs from acting on their agreement, and a protest was made against the last call of £5 per share, and a recommendation was given to the shareholders not to pay the same.

To this bill the Birmingham and Oxford Company put in a general demurrer for want of equity.

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Sir *F. Kelly*, Mr. *James Parker*, Mr. *Bacon*, and Mr. *Willcock*, in support of the demurrer.—The agreement entered into by the directors of the Birmingham and Oxford Railway Company with the plaintiffs was void *ab initio*, inasmuch as they had no power or authority given them by act of Parliament (under which alone they derived their powers) to enter into contracts involving the necessity of an amalgamation with the Birmingham and Dudley Railway Company. The legislature did not think proper to provide for such amalgamation, and the directors had no right to enter into a contract which they could only carry out through the intervention of Parliament.

A railway company may be considered as a partnership, and the act incorporating them is equivalent to the deed of partnership. Now it is settled that one partner cannot bind his co-partner by any contract which he may enter into, not connected with the object of the partnership; so, in the same manner, the directors cannot bind the shareholders by any contract not authorised by their act of Parliament: *Ward* v. *The Society of Attornies* (*a*), *Natusch* v. *Irving* (*b*), *Child* v. *The Hudson's Bay Company* (*c*). A railway company cannot enter into a contract with a steam-packet company, even though the majority of the shareholders may desire it: *Colman* v. *Eastern Counties Railway Company* (*d*). If the directors of railway companies were permitted to enter into speculations *ultra vires*, it would be a great injustice to individuals, who look at the act as the sole source of information of the liabilities and risks they incur when they become purchasers of the shares of the company. It is entirely foreign to the purposes of the act, that the control of the expenditure of the two subordinate lines should be transferred, by agreement, to the Great Western Railway Company. If they can contract for making

(*a*) 1 Coll. N. C. 370.
(*b*) Gow on Partnership, 398.
(*c*) 2 P. Wms. 207.
(*d*) Ante, Vol. 4, p. 513.

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a railway from Birmingham to Oxford, they can contract for making a railway to any other place in the kingdom. One of the causes of complaint alleged by the plaintiffs is, that the Oxford and Birmingham Company will not enforce the calls, which is a proof that it was the intention of the legislature to leave the formation of the line and control of the works in the directors of that Company. It was never intended that the Birmingham and Oxford Company should be converted into mere railway contractors. But, supposing the agreement to be a valid one, does it come within the class of contracts which a Court of equity will enforce? A Court of equity will not compel a party to build a house, but will leave the plaintiff to his remedy at law; neither will it compel a company to go to Parliament for an act, or to build a railway; nor will it prevent the defendants from opposing a bill brought in for that purpose: *Attorney-General* v. *The Manchester and Leeds Railway Company* (*a*); *Ware* v. *Grand Junction Waterworks Company* (*b*). There is nothing in the bill to shew that the plaintiffs are in a condition to call for a specific performance of the agreement; for it does not appear that they have taken a transfer or reduced their tolls, on which events alone they were empowered to contract. If they do not take a transfer, and a decree is made for specific performance against the defendants, the Great Western Company might continue in possession of the railway without any reduction of their tolls.

Mr. *Bethell*, Mr. *Rolt*, and Mr. *Stevens*, in support of the bill, contended, that, the demurrer in this case being general, if the plaintiffs could shew that they were entitled to any relief, the demurrer must fail. Now the agreement in question was divided into two distinct parts—the agreement for sale, and the minor agreement to apply to Parliament

(*a*) Ante, Vol. 1, p. 436. (*b*) 2 Russ. & Myl. 470.

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for an act. If the agreement for amalgamation and sale were not valid, at all events the Court would not interfere with the state of matters until the result of the application to Parliament was known. The prayer of the bill was, in the first place, that the defendants might be considered trustees for the plaintiffs, which required no present interference of the Court, but merely established the character which the defendants had by their contract assumed, and which they now sought to repudiate. But, independently of the written contract, there was an equity created by the acts of the plaintiffs having been acquiesced in by the defendants. The plaintiffs had incurred liabilities on the faith of the contracts, and the reason for their undertaking the risk was the accomplishment of the very object which the bill sought to carry out. There was nothing in the fact that the agreement was based on the defendants doing something which could only be done by the intervention of Parliament. If they had used their best endeavours to accomplish what they had covenanted to do, and failed, no equity could have touched them; but the possibility of their failing in their application to Parliament did not justify them in refusing to take the steps necessary to ascertain whether Parliament would or would not sanction the object of the agreement. The prayer of the bill did not seek a mandatory order to compel the defendants to build a house or construct a railway; the act had already determined that a railway should be made, and the only question was, whether the two railways, when made, should be fused into one. The legislature had already admitted and sanctioned the agreement; and although made before the passing of the acts, it had been rendered, by the recognition of it in the acts, as valid as a portion of the enactment itself. Powers had been given solely for the purposes of carrying out the agreement. There was nothing unknown to a Court of equity in an agreement to do something which would require the assistance of Parliament, nor was it the practice

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of the Court to interfere in such cases: *Lord Petre* v. *Eastern Counties Railway Company* (*a*). The settlement of family estates constantly required the intervention of Parliament; and it was the custom of the Court, if it thought that it would be conducive to the benefit of the parties, to order a cause to stand over, in order to give an opportunity for applying to Parliament for an act. If a company were to enter into a contract with an individual to purchase his land, and they were to covenant that they would apply to Parliament for power to enable them to complete their contract, would not this Court compel a specific performance of the terms? In answer to the objection, that the person who purchased shares had only to look to the act for the extent of his liabilities, it was contended, that the purchaser of shares must in many cases look further than the act. In the present case the act only gave a power to sell, but did not shew whether the power had been exercised or not, and, therefore, that information must be derived *aliundè*.

Sir *F. Kelly* replied.

The VICE-CHANCELLOR.—I have had so much opportunity given me of considering this case, that I have completely made up my mind, and shall state my opinion now.

It is perfectly true, that, at the time when the parties entered into the agreement of November, 1846, they had not the power to do the things which they proposed to have done. There was, according to the original constitution of the Birmingham and Oxford Railway Company, what I may call a limited and contingent power of sale; and, at the time when the agreement was entered into, it was manifest to all the parties to it, that, without resorting to Parliament, their object could not be accomplished.

Now, the agreement, when it comes to be construed,

(*a*) Ante, Vol. 1, p. 462.

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may be one which admits of a great deal of argument upon what is the true construction with respect to subordinate points; but, with respect to the main features of the case, there really is no doubt.

I do not mean to prejudice any future view of the case; but it appears to me that amalgamation was used by the parties as a sort of interim machinery, which, from the very nature of the ultimate object, must be dropped at the time when the sale was to be completed, because the ultimate object certainly was, that the Great Western Railway Company should be the sole proprietors of both the Oxford and the Dudley Railways. Amalgamation, therefore, if that was to be the object, must necessarily then be abandoned; but, however that may be, the parties were so perfectly well aware that they could not carry their objects into effect without the aid of Parliament, that, after all the preliminary articles had been set forth, the agreement goes on in this manner:—In the sixth clause, "The Birmingham and Oxford, and the Birmingham and Dudley Railway Company, are to be amalgamated, and powers taken for the broad gauge"—not given by one to the other, but taken as a boon from Parliament; and "powers taken for the broad gauge, in addition to the narrow thereon;" and an arrangement is to be made for the blending of the Great Western board with the directors of the amalgamated Companies, in such manner as to give the Great Western Railway Company an effectual control over the expenditure of the said Companies. The seventh clause provides, that, in the event of any point being unprovided for in this memorandum, the same to be decided, in case of difference between the parties, by Mr. Talbot. Eighth—"The terms and conditions of this agreement are to be submitted to special general meetings of the three Companies, to be convened with the least practical delay, and, when ratified, all necessary powers are to be sought for from Parliament to give effect to this agreement." Then there were the meetings; and

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it is represented, on the face of the bill, that the agreement was ratified, and that the agreement of February, 1847, was entered into, to which the Oxford Company and the Great Western Company were parties, as well as the contractors for the work; and the effect of that agreement was, to place the Great Western Railway Company (on the faith that this agreement of November was one that might be carried into effect) in this position: that the Great Western Railway Company became subject to certain liabilities, to the amount of upwards of £460,000, for the purpose of doing what? why, of completing the Oxford Railway, in order that it might, when completed, be subjected to the force of the agreement of November, 1846.

It is then stated, upon the face of the bill, that, this having taken place, certain persons, under a false pretence that the agreement was not such an one as could or ought to be carried into effect, had, through the medium of purchasing shares of those who were, in November, 1846, the shareholders in the Oxford Company, set themselves against the performance of the agreement. And what is asked by this bill, amongst other things, is not merely the performance of the agreement, but that the Birmingham and Oxford Railway Company and the directors may be restrained, by the order and injunction of this Court, from making or entering, or attempting to make or enter, into any agreement for the sale, lease, use, or occupation of the Birmingham and Oxford Junction Railway with the London and North Western Railway Company, or any other company or person whatsoever, and from in any manner dealing with the railway, or parting with, or disposing of, the monies, property, or effects thereof, except with the approbation of the plaintiffs.

Now, what is that? That is a species of request made to the Court, that, pending the decision of the questions which, I admit, do arise, and very properly, upon the agreement of November, 1846, nothing shall be done which may prejudice the fair decision of those questions.

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I admit that if it did appear overwhelmingly clear that the agreement of November, 1846, could never be carried into effect, it would be vain to talk about the intermediate protection asked by the bill; but is the agreement such an one? and is it absolutely certain that this Court will not sanction it to such an extent, as to take care that, according to the true meaning of the parties expressed upon the face of it, proper application shall be made to Parliament, in order that it may be seen whether the ultimate tribunal will give effect to the agreement or not?

Now I do not apprehend that the mere circumstance that persons have not dominion over the property with which they affect to deal, makes any agreement which they may enter into in respect of such property necessarily vicious in this Court. You can put the most simple case: take the case of two settled estates, that A. is tenant for life of one, and B. is tenant for life of the other; and the parties come to an agreement, that, provided A. will do certain works on his estate, then the two estates shall be exchanged, and that the estates are in such a situation as that the exchanges cannot be carried into effect without the authority of Parliament; and suppose, upon the faith of such an agreement, that A., who is to do the works, expends *bonâ fide* any unlimited sum in the prosecution of those works, and, before the works are complete, that B. were to recede from the agreement, and be disposed to enter into a contract with a third person, of such a nature as to disable him ultimately and wholly from completing the agreement; on an application made to this Court by A., would no interference take place? It is impossible to suppose the Court would not interfere. But here, these parties, being weak in power but clear in intention, have manifested what their intention is, and on the faith that a certain agreement shall be carried into effect, not by powers inherent in the parties, but by powers which are sought for from Parliament, one of them incurs those liabilities which are stated in the pleadings.

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Now, I admit that the simile in some degree fails, because to a certain extent there was a change of character introduced into this case, because, as it is stated, those persons who were the shareholders at the time the agreement was made have parted with their shares and interests to other persons; and it is contended that those other persons have a right to oppose the agreement.

That is the great point in the cause, and I have expressed an opinion,—and I believe the Lord Chancellor has confirmed it,—that where an agreement simply, and nothing more, is made, and some resolutions have been come to by the directors which only affect the Company itself, those who did approve it at one meeting may, by a transmission of their shares to other persons, give to those other persons a right to object to what has been before done (*a*). That is all very well with respect to the Company itself; but then the great question arises, whether in a case in which the directors, using the authority sanctioned according to the mode described by the act of Parliament, by more than three-fifths of the body, have entered into such an engagement as necessarily has produced the effect, that on the faith of it third persons have implicated themselves,—that is, have placed themselves in a situation in which but for the agreement they would not have placed themselves,—whether in such a case it shall be competent for persons who newly become the purchasers of the shares to do anything more than this, to purchase the shares *cum onere* of performing the antecedent agreement entered into by the Company to which the shares belong.

That is the main question, and I must say that it appears to me, that, though it may be difficult to deal with, yet the great thing to be attended to in all these doubtful cases is this,—what is the plain truth, and justice, and honesty of the case? And if the Court has that clearly

(*a*) *Exeter and Crediton Railway* v. *Walker*, ante, p. 211.

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laid before it, my opinion is, that it is the duty of the Court rather to stretch a point, as against mere formal objections, than for the sake of mere form to sacrifice the truth and justice of the case.

Now it appears to me, that it is represented that there is this intention to defeat the agreement; and it being represented that, upon the footing of the agreement, such as is stated, the liabilities have been incurred, my opinion is, that I ought not to make an order which shall be a partial accomplishment of the agreement; nor shall I do so, because I am proceeding on the footing that the question, whether the agreement can be performed at all or not, is to be preserved. I am only asked by the demurrer to do this—to decide whether, in effect, I shall, without the full hearing of the case, and without first seeing what Parliament will do, at once put an end to the whole transaction, and permit the parties who now possess the shares of the Company, by dealing with them as they propose to do, peremptorily to put a final end to the agreement.

There is this also to be observed: that two acts have been passed since the agreement was entered into,—those acts which I call the fourth and the fifth acts, for the sake of convenience; both of which acts contain sections which it is impossible for any one to read without seeing that, in the eye of the legislature, it appeared beneficial that the substance of the agreement itself should be carried out, at least as to the Dudley Railway. Then it appears there was an attempt also made of a similar nature with respect to the Oxford Railway, and that failed. It failed, as it appears to me, on a mere matter of form; but I wish to know what will be the event, if this Court declare that the agreement is one that can be sustained through the medium of making a proper application to Parliament, and the wisdom of Parliament may not in a future session be found to coincide with that of a former session, and give powers in full to do that which hitherto has only been con-

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ferred in part? That is another question; and it appears to me to be so reasonable an inference, to be drawn from what has actually taken place by the authority of these acts of the 9th and 22nd July last, that hereafter greater authority will be granted for the purpose of giving effect to the agreement, that, in my opinion, I am bound to preserve the question entire till the hearing of the cause, and therefore I must overrule the demurrer.

During the sittings after Michaelmas Term, plaintiffs' counsel moved for an injunction in the terms of the prayer of the bill, and the case having been argued for three days, his Honor pronounced the following judgment:—

Dec. 4th.

VICE-CHANCELLOR.—It has appeared to me on this motion, that, subject to any question there might be about the use of particular words, I must act upon the principle which I thought it right to adopt in respect of the demurrer, and I must, as far as possible, keep things in the same state as they now are. I cannot allow the ultimate question, whether the agreement of the 12th November shall be carried into effect, to be affected by an intermediate act.

It appears to me, though it has been contended that the Birmingham and Oxford Railway Company cannot make any binding agreement for sale or lease of their railway to the North Western Railway Company, that they might yet make a contingent agreement, (I do not introduce any word about legal agreement), just in the same manner as this very agreement itself has been constituted.

My opinion is, that the principle on which the judgment on the demurrer proceeded will authorise me to say that the parties named should be restrained by the order and injunction of the Court from making or entering into, or attempting to make or enter into, any agreement for the sale, lease, use, or occupation of the Birmingham and Oxford

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Railway with the London and North Western Company, or any other company or person whomsoever. I am not aware that there is any other company or person whatsoever suggested, and therefore it might perhaps be as well to leave out those words. The second part is abandoned; and then the next part is, "and from passing, acting upon, or giving effect to any resolution, or of doing any other act for the purpose of preventing the payment of the call of £5." Now it appears to me that this has nothing whatever to do with the application; it has only to do with the actual call that has been made; and it is quite consistent with the principle on which I overrule the demurrer, that I should grant the injunction as it is here asked. Then the last part is, "from doing or procuring the doing of any act, matter, or thing, the doing whereof is or may be a breach or violation of, or inconsistent with, the agreement of the 12th November, so as to prevent the performance thereof."

The principle on which I acted before, justifies me in granting the injunction in those terms, and I grant the injunction accordingly.

From this judgment the defendants appealed, and the demurrer was argued by the same counsel as in the Court below.

1848. *9th Feb.*

LORD CHANCELLOR.—The value of the interest at stake, and the amount of the property invested in the railways in question, must explain the great importance attached to the discussion of the demurrer; for the case, as made by the bill, does not appear to me to raise any difficulty as to what ought to be my decision. The application of the familiar rules of the practice of this Court shews plainly that there is no tenable ground on which the demurrer can be supported.

In deciding demurrers, where there are grounds for

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a decision, independently of the real question between the parties, I have always thought it expedient to avoid expressing an opinion on the merits, and the bill in the present case affords me an opportunity of continuing this practice.

The bill, after stating the agreement for the sale of the railway, goes on to say, that, on the faith of that agreement, the plaintiffs had come under liabilities to the amount of several hundred thousand pounds for the due prosecution of the works; that these sums were to be repaid by calls made on the subscribers to the Oxford and Birmingham Company; that the Company had attempted to recede from this contract, and to prevent such calls from being so applied; that they threatened and intended to sell the railway to the London and North Western Company, and they, therefore, pray a specific performance of the agreement, and that the defendants might be restrained from attempting to sell or in any other way interfering with the rights obtained under the agreement.

It is certain that the Court will interfere to preserve property in *statu quo*, during the pendency of a suit in which rights are to be decided, and that interference frequently takes place without expressing, and often without the means of forming, any opinion on the rights of the parties. A vendor *pendente lite* might convey away the legal estate in a manner which would embarrass the original purchaser in his suit against him, and in such a case the Court interferes by injunction. Cases of this kind are numerous: *Echliff* v. *Baldwin* (*a*), *Curtis* v. *Marquis of Buckingham* (*b*), *Spiller* v. *Spiller* (*c*). To this effect is an expression of Lord Eldon's, in *Dally* v. *Kelly* (*d*): "If there are vexatious alienations pending a suit, the Court will restrain them."

If there is no real question between the parties, the Court will not interfere; but where there is a substantial ground

(*a*) 16 Ves. 267.
(*b*) 3 Ves. & B. 168.
(*c*) 3 Swanst. 556.
(*d*) 4 Dow, 440.

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for proceeding, the property will be preserved until the question at issue is regularly disposed of. In order to support an injunction for such a purpose, it is not necessary for the Court to decide in favour of the plaintiff on the merits. When a bill charges an intention to do certain acts, the title to an injunction may be good, although the title to the relief which it prays may not afterwards be sustained. Is this then, the case made by the present bill, so clear in favour of the defendants, and so inadequate to support the equity prayed by the defendants, as to justify the Court in permitting it to be disposed of, and a new title or interest introduced, before a decision on the main question raised on the bill? The case made is, that the Birmingham and Oxford Company, under the act of the 9 & 10 Vict., have powers given them, with the authority and sanction of three-fifths of the proprietors assembled at a meeting specially called, to sell and transfer to the Great Western Company their railway, or any part thereof; that on the 12th November, 1846, they entered into an agreement for that purpose; that such agreement was duly ratified by three-fifths of the proprietors, and that, after incurring heavy liabilities on the faith of that agreement, the defendants threaten to sell the railway to the North Western Company, and to prevent any calls from being made to discharge the liabilities.

The defendants, on their part, say, that if that was the simple statement of the case, the injunction might be granted, but that there are circumstances in the bill which shew that the plaintiffs are not entitled to such protection; for that the agreement of November was not merely a contract with the defendants, but also with the Wolverhampton and Dudley Company, and the agreement expressly provided for the amalgamation and subsequent sale of both railways, for which amalgamation and sale there was no parliamentary authority at the time of the contract. But the answer to that objection is a statement in the bill, that by an act of July, 1847, the Wolverhampton Company were duly author-

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ised to carry the agreement of November, 1846, into effect, which would be sufficient; and that as to amalgamation, the provisions between the two Companies were confined to the period during which the works were in progress; that those works must be completed before a sale takes place, and that these provisions were inapplicable to the state of things, when one Company possessed all the three railways. Under such circumstances, the amalgamation having been previously resolved on, the plaintiffs charge that the objection cannot arise.

However this may be, I see that the agreement expressly provides for seeking powers from Parliament to give it effect; and by this appeal, I am asked to treat such agreement as a nullity, and to hold that all other contracts are to be treated as null when the parties to them, not having full powers at the time of entering into them, must go to Parliament, and this Court is not to be at liberty to protect the property until the parties have an opportunity of so going to Parliament. The effect of such a course of proceeding would be to nullify many family arrangements entered into frequently under the sanction of this Court, which require certain powers to be obtained from Parliament in order to give effect to them. Such a course would also nullify all contracts by persons projecting new Companies before an act of Parliament could be obtained to sanction them.

More than twelve years ago I had occasion, in a case of *Edwards* v. *The Grand Junction Railway Company* (*a*), to give effect to a contract entered into by the projectors before their act of Parliament passed, but made in contemplation of its passing, with an incorporated body. That was a contract which the parties could not execute at the time, but proposed to obtain an act to sanction. Since that time there have been many cases to the same effect.

I am, therefore, not prepared to say, by allowing this

(*a*) Ante, Vol. 1, 173.

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demurrer, that the contract entered into was a nullity, because some of its provisions might require an act of Parliament to carry them into effect. The objections of the defendants apply only to some of the provisions of the agreement; the substance of it is the sale of the Oxford and Birmingham Railway. Is it quite certain, that, under such circumstances, the defendants can be heard to say, that the plaintiffs are not to have the benefit of such parts of the contract as can be performed, because the whole of the contract cannot be performed without an act of Parliament; and, moreover, that the plaintiffs are to be precluded from taking an opportunity to obtain those powers?

In general, a purchaser is entitled to all that a vendor contracts to give him, and to compensation for what he cannot give him, if it has formed part of the contract. This is clearly illustrated in the case of *Lawrenson* v. *Butler* (*a*). In the present case, the Court is called on to say, not that the plaintiffs are to have compensation for the part not performed, but that, as they cannot obtain all they have agreed to purchase, they are not to be assisted in getting a part; and still more, that the contract itself must be considered as at an end. I abstain from touching on many other topics raised in the argument, because I think I have already explained sufficiently the ground on which, in my opinion, the defendants have failed in shewing that the plaintiffs have no title to any part of the relief or protection which they ask by their bill, and that they have made this clear enough to deprive the Court of any right to interfere, so as to preserve the property in contest, until such time as the title to it shall become the subject of a judicial decision. The demurrer was therefore properly overruled, and the appeal of the defendants must be dismissed with costs.

(*a*) 1 Sch. & Lef. 13.

1847.

BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

July 21st.
1848.
May 29th,
June 8th.

LANGHAM *v.* GREAT NORTHERN RAILWAY COMPANY.

A railway company, after fruitless negotiation, and after having given notice of their intention to summon a jury, under the 68th section of the Lands Clauses Consolidation Act, to settle the amount of compensation to be paid to A. and B., the tenants in common of a piece of land required for the purposes of their railway, proceeded to enter upon the land under the summary powers given by the 85th section of the same act. They paid the determined value into the joint account of A. and B., and delivered a bond conditioned for the payment on demand to A. and B., heirs, executors, administrators, or assigns, or deposit on demand, &c., of such purchase-money or compensation as might be determined to be payable:—*Held*, that the payment and the bond given in the above form to persons tenants in common of land, although represented by one solicitor, and acting together, were irregular. That the words, "on demand," inserted in the condition for payment, was not a compliance with the terms of the 85th section of the Lands Clauses Consolidation Act.

Plaintiffs were five persons, three of whom were tenants in common, and two were devisees in trust for sale of land, the subject of the suit. Quære, whether there was not a misjoinder of plaintiffs?

THIS was an application by the plaintiffs for an injunction to restrain the Great Northern Railway Company from entering and taking possession of a piece of land, situate in the parish of St. Mary, Islington, required for the purposes of the railway.

The plaintiffs in this suit were five gentlemen, three of whom, of the name of Langham, were tenants in common, under a will, of three-fourths of the piece of land in question, and the two other plaintiffs were devisees in trust for sale of the remaining one-fourth.

In April, 1847, the Company served a notice, in the usual form, on the plaintiffs, declaring their intention to take the said piece of land, and requiring them to state their rights and interests, and to make out their claims. A negotiation thereupon commenced between the parties, and the plaintiffs, on their part, appointed a surveyor, who valued the land at £8093, and the Company appointed their surveyor, who valued it at £3300. In consequence of the great difference in value, the Company were unwilling to pay the compensation claimed or to enter into an agreement for that purpose; and on the 27th of May, they proceeded, under the 68th section of the Lands Clauses Consolidation Act, to give notice of their intention to issue their warrant to the sheriff to summon a jury to settle the amount of compensation to be paid to the owners.

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Nothing further was done by them until the month of August, 1847, when they determined to proceed under the 85th section of the said general act, and caused the land to be valued by a surveyor appointed by two justices, (who was, in fact, the same surveyor who had already valued the land for the Company pending the negotiation), and deposited the sum of £3300, the determined value, in the Bank, to the joint account of the five plaintiffs, and delivered to them one bond for the like amount, dated the 12th of August, the condition of which was, that if the Company and A. and B. (the sureties), or any of them, do and shall, on demand, pay or cause to be paid to the plaintiffs [*nominatim*] (*a*), heirs, executors, administrators, or assigns, or do and shall, on demand, deposit in the Bank of England, &c., the amount of all such purchase-money and compensation &c. [in the usual form].

This bond was subscribed by the two sureties, who were the solicitors of the Company.

It appeared from the plans that the Company proposed to cross the plaintiffs' land by an embankment, which would necessarily make a material change in the appearance of the ground.

Mr. *Bacon* and Mr. *Pole*, for the plaintiffs, contended, that the Company, having given notice of their intention to issue a warrant for summoning a jury, had no right to withdraw that notice, and proceed under the 85th section; that if the Company were now permitted to enter, and commence their embankment, a jury would not be able fairly to estimate the value which the land bore previously to the change which such works must effect. That, although the plaintiffs had allowed the time for compelling the Company, by a mandamus, to summon a jury, yet this Court would look into the circumstances; and when it saw that the plaintiffs

(*a*) The word "their" was not inserted.

had been deprived of their remedy by the negotiations and delays of the Company, and that irreparable damage would arise to the plaintiffs by their being now permitted to enter before valuation, it would interfere by injunction to prevent the Company from depriving the plaintiffs of their means of getting a fair compensation for their land. That the surveyor appointed by the justices, who had already acted for the Company, was not an impartial person, as it was natural to suppose that he entertained a bias in favour of that party for whom alone he had acted in the former negotiations; and also that he would not enter upon his duties without some feeling of preference in favour of the valuation he had already made. That the sureties to the bond were not sufficient within the meaning of the act, they being in fact the officers of the Company, who had already incurred enormous liabilities on their account. That the form of the bond was objectionable, inasmuch as it required a previous demand by the plaintiffs, which the Company were not authorised to interpose, and also because it had been given to all the parties, as if joint tenants, whereas the interests of the parties in the land in question were distinct, and capable of being made the subjects of separate agreements. [It was also contended that the appointment of the surveyor and of the sureties ought not to have been made *ex parte;* but the case of *Bridges* v. *The Wilts and Somerset Railway Company* (*a*), having been handed to his Honor, he refused to entertain that objection.]

The VICE-CHANCELLOR, in the course of, and after the conclusion of the plaintiffs' argument, said, that, as to the first point made by the plaintiffs, the Company had the power of entering and using the plaintiffs' land on certain conditions; and if those conditions were complied with, he did not think a court of equity had any jurisdiction to in-

(*a*) Ante, Vol. 4, p. 623.

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terfere by injunction. As to the appointment of the same person to value the land who had formerly acted on behalf of the Company, although he did not like the appointment of the same person to act as the general valuer who had been specially appointed for the Company, and acted on their behalf during their negotiation with the plaintiffs, yet he could not judicially interfere on that account. As to the alleged insufficiency of the sureties, he did not think any case for the interference of the Court had been made out.

The *Vice-Chancellor* then called upon Mr. *Wigram*, who appeared on behalf of the Company, to argue the point of the sufficiency of the bond, and at the conclusion of his argument,

The VICE-CHANCELLOR said:—This proceeding having been *ex parte*, it was incumbent on the Company to have been strictly correct and regular in their proceedings. It strikes me that this bond is not strictly correct and regular. If the treaty, so far as there was a treaty, had not been conducted by all the tenants in common acting together as one person, and carrying in one claim, I should have felt much less difficulty on this point than I do. This difficulty, arising from the manner in which the rights of the different parties are placed together in this bond, has been caused by the manner in which they themselves have acted together in this matter; still, although they did act together, that did not, I apprehend, give a license to the Railway Company to deal with the purchase-money which would have to be paid for each several share, or the several rights of each, in an irregular manner. But, assuming that the manner in which they have acted, employing as they did but one solicitor, would have justified or rendered excusable for the present purpose one bond given to all jointly, it is a different question whether the money that has been paid into the Bank

should have been paid in one sum, as it has been, to the joint account of all, and also, whether the condition of the bond should be in these words: "do and shall, *on demand*, well and truly pay or cause to be paid to," &c., so and so, treating them jointly, or do and shall "deposit in the Bank of England the amount of all such purchase-money or compensation," &c. It strikes me that that was irregular, and that the manner in which the owners of the land have acted together, does not preclude them wholly and in every part from taking this objection. They have not misrepresented their title, nor is it to be inferred that the Railway Company was ignorant of it; for, in the first instance, the three gentlemen named Langham were mentioned in the first notice, and then there was added, in a subsequent notice, the names of the devisees of another gentleman of the same name.

I think, therefore, that this bond, notwithstanding all that has taken place, and notwithstanding the form of the suit, as it was an *ex parte* proceeding, is irregular; and I say this independently of the observation which I am about to make, founded upon the words "on demand," which I think occur twice. On this point I will not give a conclusive opinion at present; but the present inclination of my judgment upon the subject is, that that will not do, and that the insertion of those words may create a difficulty which was not intended. I rather think that it ought to be taken as the intention of the Legislature that that which was directed to be done should be done at the first moment that it could be done, and of the mere motion of the Company without any demand. I rather incline to that view of the case: if so, the bond is wrong also in that respect (*a*).

There is a slight omission in the bond, too, which perhaps would not be noticeable but for the peculiar state of the title. It is merely a slip of the pen, and it occurs in the condition,

(*a*) See *Poynder* v. *Great Northern Railway Company*, ante, p. 196.

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which is as follows: "Now the condition of the above-written bond or obligation is, that if the above-bounden Railway Company do or shall, on demand, well and truly pay or cause to be paid to the said plaintiffs [*nominatim*], heirs, executors, administrators, and assigns," omitting the word "their." Now, if they were clearly joined together, and there was no difficulty or doubt about the title, I am disposed to think, and I believe there is some authority for it at law, that I ought not to treat the omission of that word as immaterial. I am not satisfied in this particular case, that the omission, although merely accidental, is immaterial. However, I do not give any opinion upon the insufficiency of the bond upon that ground. I doubt very much whether the bill is in a proper form; whether these parties, being tenants in common, there is not a misjoinder. However, I do not apprehend that at this stage of the cause, there not being any plea or demurrer, the Court is bound to take advantage of it. I found my judgment on the insufficiency of the bond; but, notwithstanding my view of it, I do not know that the Court is positively bound to grant the injunction. I am of opinion that the bond is insufficient; therefore, that the condition precedent to the right of entry has not been performed.

[By agreement between the parties, it was arranged that the Company should not take possession of the land until the expiration of five days, and should not enter upon it until they had lodged a warrant for summoning a jury. At the same time the Company undertook, after having lodged such warrant, to prosecute it with due diligence] (*a*).

(*a*) See further proceedings in this case, the next and following pages.

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BEFORE VICE-CHANCELLOR OF ENGLAND AND LORD CHANCELLOR.

May 28th & 29th.
June 8th.

Ex parte THE GREAT NORTHERN RAILWAY COMPANY.

A Railway Company, in order to enter upon land under the 85th section of the Lands Clauses Consolidation Act, gave to the owners a bond, and deposited the estimated value of the land according to the provisions of that act. They afterwards paid the amount found by a jury to be the value of the land, and obtained a conveyance from the owners, and thereupon petitioned for the payment out to them of the sum deposited. The owners opposed the petition, on the ground that the costs of ascertaining the value, and of the conveyance, and of a suit occasioned by the Company, had not been satisfied:—*Held*, by Lord Chancellor, reversing the order of the Vice-Chancellor of England, that, upon the construction of the 80th and 85th clauses of the Lands Clauses Consolidation Act, the Company were entitled to the payment out to them of their deposit, and that the owners of the land had no lien on the deposit for such costs.

THIS was a petition presented by the Company, the defendants in the preceding suit, praying that certain Exchequer bills, in which the sum of £3300, deposited by them in court to the account of the plaintiffs in that suit, under the circumstances hereinbefore stated, had been invested, might be delivered out to the secretary of the Company.

The petition stated, that after the sum of £3300 had been deposited, and, by order of the Court, invested in Exchequer bills, the amount of the purchase-money and compensation was ascertained in the manner provided by the general act, and determined to be £5000, together with interest and rent as agreed between the parties.

On the 10th of February, 1848, these sums were paid to the plaintiffs in the suit, who thereupon delivered up the bond to the petitioners, and executed and delivered to them a deed of conveyance of the land.

In opposition to this petition, an affidavit was filed by the owners of the land, which, after stating the different proceedings between the parties, set forth, that the costs, charges, and expenses incurred by them in taking the inquiry before the sheriff, in procuring the attendance of witnesses, the employment of counsel and attornies, and otherwise incident to such inquiry, were then under the consideration of the Court of Queen's Bench, and had not been settled, ascertained, or paid; that the costs, charges, and expenses incurred by them relating to the conveyance of the land, and

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of deducing, evidencing, and verifying their title thereto, and of making out and furnishing abstracts of their title, and the reasonable expenses of such owners incident to the investigation, deduction, and verification of such title, had been delivered to the solicitors of the said Company, but the same had not been paid, and that the costs of the suit had not been taxed or paid by the Company, although an account thereof had been delivered to the solicitors.

Mr. *Craig*, on behalf of the petitioners, submitted, that all the Company had to shew to entitle them to the order as prayed, was, that the condition of the bond had been fully performed, and that they could not under any circumstances be entitled to the costs of the suit, which must be under the jurisdiction of the judge before whom that suit was pending.

Mr. *Pole*, contrà, contended, that, under the 80th section of the Lands Clauses Act, the Court had jurisdiction to order the costs mentioned in the affidavit to be paid before the money deposited be touched by the Company; that the words "other than such costs as are herein otherwise provided for," referred to the costs provided for by the 51st, 52nd, and 53rd, and the 62nd and 67th sections, which referred only to proceedings before a jury or before arbitrators.

Mr. *Craig* replied.

The VICE-CHANCELLOR.—I rather think I have decided this point before. It appears to me that the act of Parliament is so framed that the general provision of the 80th section cannot be taken to be confined to a particular portion of the act. It would be a strong thing to say, that where there are such general expressions as those which are found in the 80th section, you are to put a limited construction upon them, and confine them to one head of costs. My

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impression is, that I have decided in a former case that the 80th section of the Lands Clauses Act applies to all cases of money paid into the Bank, and I do not think there is anything in the 85th section to take the case of money paid in under that section out of the category. If the Legislature will put in such words as we find in this 80th section, effect must be given to them. I do not think that there is anything in the words of the 87th section, "and upon the condition of such bond being fully performed, it shall be lawful for the Court of Chancery to order the money so deposited to be repaid," &c., which limits the previous general power of the Court as to costs. And if I find that the Company have obliged the owners of land to incur costs, which have not been paid, the Court has jurisdiction to say that the money shall not be paid out until all the money due from the Company has been paid. If the Company be liable to pay certain costs, what matter how they are paid; it is more simple to say, let all the costs be ascertained, and paid out of the sum *in solido*. My opinion is, that in case the parties differ as to the amount of the costs claimed by the respondents, it must be referred to the Master, and unless the agreed or taxed costs be paid, part of the Exchequer bills must be sold to pay the costs.

The *Vice-Chancellor* thereupon made the following order:—Refer it to the Master to tax the respondents' costs of the following matters, pursuant to the said act of Parliament, viz. their costs of the conveyance, including all charges and expenses, incurred by the said respondents, of all conveyances and assurances of the lands taken by the petitioners, or of any outstanding terms or interests therein, and of deducing, evidencing, and verifying the title thereto, and of making and furnishing such abstracts and attested copies as the petitioners required, and all other reasonable expenses incident to the investigation, deduction, and verification of such title, and the costs of the said respondents (including

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all reasonable charges and expenses incident thereto) of the purchase or taking the lands, or which had been incurred by the respondents in consequence thereof, including their costs of the suit in this Court, intitled *Langham* v. *Great Northern Railway Company*, and their costs of the said order and relating thereto; and the said respondents admitting that the costs of the jury had been taxed and settled at the sum of £216, it was ordered that so many of the Exchequer bills in Court as, with the cash in the Bank, would raise the said costs when so taxed, and the £216, should be sold; and out of the money to arise by the said sale, it was ordered that the said costs and sum of £216 should be paid, and that the Exchequer bills and cash remaining after the sale and payments thereby directed should be delivered out and paid to the secretary of the Company, according to the form prescribed by the act.

The Company thereupon presented a petition, by way of appeal, to the Lord Chancellor, praying that the order of the *Vice-Chancellor of England* might be discharged, and that an order might be made in the terms of the prayer of the original petition.

The same counsel appeared as in the Court below.

June 8th.

The LORD CHANCELLOR.—The act directs the promoters to pay the expense of the jury in certain cases. It directs the promoters to pay the costs of the conveyance, and it directs the mode in which those costs are to be ascertained and paid, and the remedy for those costs if they are not paid. So far the act is imperative. It imposes a duty, and gives the remedy. Then comes the 80th section, which gives the Court discretion, but it is a discretion as to costs only applicable to cases other than those in which the costs are otherwise provided for. Now the costs are otherwise provided for both as to the expense of the jury process and as to the

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expense of the conveyance. It is impossible, therefore, to bring this within the 80th section. Then, if it is not within the 80th section, there is no provision in the act giving the Court discretion and power as to costs. There is no discretion to be exercised in a matter in which the act is imperative. There is an order which says the costs shall be paid, but it is not left for the Court to direct. The act has directed it, and the payment is to be enforced in a particular mode. The costs to be paid by the promoters are left to the Court under the 80th section, but that is only as to costs which are not otherwise provided for; and as to the costs in question, they are otherwise provided for.

With respect to the costs of the suit, as I have already said, they ought not to be included in this order: they are not under the act at all. The suit in equity arises, it is true, in consequence of the provisions of the act, but it is not an application under the act. The proceeding itself is not under the act, but, on the contrary, a proceeding to prevent the parties from violating the act; so that in no case can the costs of the suit be considered as costs provided for by the act, but only as costs incurred by the prosecution of the provisions of the act. I think, therefore, the two classes of costs which are the subject of this discussion ought not to be included in the order. It is quite unnecessary they should. There is ample power in the act for the payment of the costs. The costs of the suit will be disposed of in the branch of the Court to which that suit belongs, but the others are disposed of by the provisions of the act; therefore I think the order must be altered as prayed.

June 8th.

The plaintiffs then applied to the Company for the costs of their suit, which they refused to pay, whereupon they applied, by motion, to his Honor, *Knight Bruce*, V. C., for an order that it be referred to the Taxing Master, to tax the

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plaintiffs' costs of the suit and of the application, and that the Company might be ordered to pay such costs, and that the proceedings in the suit might be stayed.

Mr. *Bacon* and Mr. *Pole*, in support of the motion, contended that this motion was the proper course to entitle the plaintiffs to their costs; that if they had gone on with the suit, the whole object whereof was at an end, without first applying to the Court, they would have been liable for the costs of all subsequent proceedings; and they cited *Sivell* v. *Abraham* (*a*), and *Winter* v. *Vizetelly* (*b*).

The VICE-CHANCELLOR.—In the case before the *Vice-Chancellor of England* there was no opposition made to the motion. The parties had agreed to pay the costs. A defendant is entitled to file his answer, to be read on the question of costs. I must refuse this motion, although I confess reason and sense seem to be in favour of it. I say this, assuming as I must for the present purpose, that the statements of the plaintiffs' bill are true. I shall reserve the costs, unless the defendants can shew sufficient reason why I should not.

Mr. *Wigram* and Mr. *E. B. Denison* failed in altering the opinion of the *Vice-Chancellor*, and he reserved the costs accordingly.

(*a*) 8 Beav. 598.

(*b*) Decided by *Vice-Chancellor of England*, but not yet reported.

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COURT OF EXCHEQUER.

Easter Term, 1848.

THE NEWRY AND ENNISKILLEN RAILWAY COMPANY *v.* EDMUNDS. *Feb.* 5.

DEBT for calls of the Company against a shareholder, under the Companies' Clauses Consolidation Act, 8 & 9 Vict. c. 16.

Pleas—1*st*, never indebted; 2*dly*, a traverse of the defendant being holder; 3*dly*, a traverse of the making of the call.

The cause was tried before Lord *Denman*, C. J., at the Surrey Spring Assizes, 1847, when it appeared that the plaintiff was the holder of fifty shares in the Company, which was incorporated by the 8 & 9 Vict. c. cxxix, and that the action was brought to recover the sum of £225, being the amount of two several calls on those shares.

The defendant was not an original allottee, but had purchased the scrip certificates of his shares in the regular way in the market; and in September, 1845, he sent his scrip certificates to the Company, claiming to be registered in their books as the holder of fifty shares: his name was accordingly entered on the *draft* register of shares. It further appeared, that after the first call of £2 per share had been made, and at the second meeting of the Company, on the 27th of February, 1846, a sealed register of the Company, from the draft register, was for the first time made,

A call under the 8 & 9 Vict. c. 16, means an application to the shareholders for money. The resolution of the directors to make a call need not specify either the time or place of payment, though the directors must appoint a time and place, which must be notified to the shareholders by a notice, allowing them 21 days for payment. A transferee of scrip certificates of shares in a railway company is not liable for calls under the 8 & 9 Vict. c. 16, unless at the time of making the call his name be on the *sealed* register of the company. Whether an original allottee would be liable, though his name be not on the sealed register, *quære?* Pursuant to a resolution of the directors, notice of a call was given to the shareholders, but no time or place of payment was provided by the resolution, though it was by the notice. In debt against a transferee of scrip shares who had claimed to be registered, and whose name had been entered on the *draft* register, but not on the *sealed* register of the Company—*Held*, that, under the 8 & 9 Vict. c. 16, it was not a condition precedent that the same application should be made to each shareholder for the same portion of the sum originally subscribed, nor that the resolution should contain a direction as to the time and place of payment; it is sufficient if the time and place be notified to the shareholders twenty-one days before payment required.

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to which was affixed the corporate seal, and in which the defendant was registered as the holder of fifty shares. At a meeting of the directors of the Company, held on the 22d of June, 1846, it was resolved that the second call should be made, and that one month's notice be given, but no time or place for payment was provided by that resolution. On the 28th June the following letter was sent by the secretary of the Company to the defendant:—"Sir, The directors of the Newry and Enniskillen Railway Company having made a call of 2*l.* 10*s.* per share, payable on or before the 8th of August next, you are requested to pay the sum of £125, being the amount payable in respect of such call on the shares held by you in this Company, to any of the under-mentioned bankers. [Here followed the names.] The bankers have instructions to charge interest at the rate of £5 per cent. per annum on all sums which shall be tendered after the said 8th day of August next." It was thereupon contended on the part of the defendant, that, inasmuch as he was not on the sealed register at the time of the making of the first call, he was not on the register of shareholders within the meaning of the statute at that time, and consequently not liable for the amount of that call. That the second call was insufficient, as the resolution of the directors did not state the time or place of payment. His Lordship directed a verdict for the plaintiff for the amount of both calls, giving the defendant leave to move to enter a verdict for him.

April 23. *Bramwell* now (*a*) moved.—The call means the resolution. As to the second, that was insufficient for want of a time or place of payment; and being so, the notice was bad, inasmuch as there was no valid call. The 21st section of the 8 & 9 Vict. c. 16, enacts, that "The several persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall pay the sums respectively

(*a*) Before *Pollock*, C. B., *Parke*, B., and *Platt*, B.

so subscribed, or such portions thereof as shall from time to time be called for by the Company, at such *times* and *places* as shall be appointed by the Company," &c. The 22nd section, after providing for the notice of and the intervals between the calls, enacts, " And every shareholder shall be liable to pay the amount of the calls so made in respect of the shares held by him to the persons, and at the times and places, from time to time appointed by the Company." It is therefore submitted, that no call can be valid unless there be a time and place of payment. [*Parke*, B.—This Court decided, in *The Great North of England Railway* v. *Biddulph* (*a*), that the resolution need not specify the place of payment. Does the word " call" mean anything more than a call for money; and is not that, an application for money? If that be so, the legislature says that there shall be an application for money to each subscriber.] It is submitted that the word " call," in the act of Parliament, is not used in that sense; and it must be taken as saying—make a call, give a time and place for payment, and twenty-one days' notice, and then you may maintain your action. He then contended, that the defendant was not liable for the amount of the first call, his name not being on the sealed register at the time it was made.

POLLOCK, C. B.—We think you are entitled to a rule on the last point; but with respect to the other objection, it appears to me that there is no foundation for it.

PARKE, B.—I am of the same opinion. It is clear that the word " call" is used in the act in two different senses. In one part it means the applications to the shareholders to pay, and in another the amount to be paid. The sections which empower the Company to make calls contain no express direction that the same application shall be made to each individual for the same portion of the sum originally

(*a*) Ante, Vol. 2, p. 401; *S. C.*, 7 M. & W. 243.

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subscribed. Probably the directors may object to do so, but I am certainly of opinion that it is not a condition precedent to their right to recover the amount of the call. If we were so to hold, the affairs of these companies would be in the greatest confusion; for suppose a notice were by accident to be mislaid, the consequence would be, that the shareholder for whom it was intended would not be bound to pay his call, and those who had already paid on individual notices, and who might be supposed to have paid on the faith that the call was made equally on each, would have a right to claim back the money they had paid, on the ground that it was paid under a mistake of the facts. That construction would be fraught with such evil consequences, that I think it impossible (putting a reasonable construction on the act of Parliament) to say that the legislature intended that what they have not expressly declared, but which is only implied, should amount to a condition precedent. I am therefore of opinion that it is not a condition precedent that each party should have notice to pay the amount of his call at the same time and place. It follows that the resolution to make a call need not specify either the time or place for payment; but the directors must appoint a time and place, which must be notified to the shareholder by a notice, allowing him twenty-one days for the purpose of payment. The case of *The Great North of England Railway* v. *Biddulph* (*a*) proves that the resolution need not specify the place of payment; and I think that by implication it also proves that it need not contain the time. The resolution is nothing more than a determination that thereafter "a call" shall be made; that is, that an application shall be made to each shareholder for a proportion of his share. And it is enough if the directors appoint a time and place, either by public advertisement (where such a mode is allowed by the private act), as in the case referred

(*a*) Ante, Vol. 2, p. 401; 7 M. & W. 243.

to, or under the general act, by an individual notice to each shareholder; consequently that objection cannot prevail.

PLATT, B., concurred.

Rule nisi on the last point.

Shee, Serjt., *Petersdorff*, and *James* now shewed cause(*a*).—Though the defendant's name was not on the sealed register at the time of the first call, the plaintiffs are entitled to recover in respect of that call. The 27th section of the 8 & 9 Vict. c. 16, declares(*b*), that on the trial it shall be suffi-

(*a*) Before *Parke*, B., *Alderson*, B., and *Platt*, B.

(*b*) The following are the sections of the 8 & 9 Vict. c. 16, bearing upon the present case:—Sect. 8 enacts, "That every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company."

Sect. 9 enacts, "That the company shall keep a book, to be called the 'Register of Shareholders,' and in such book shall be fairly and distinctly entered, from time to time, the names of the several corporations, and the names and additions of the several persons entitled to shares in the company, together with the number of shares to which such shareholders shall be respectively entitled, distinguishing each share by its number; and the amount of the subscriptions paid on such shares, and the surnames or corporate names of the said shareholders, shall be placed in alphabetical order; and such book shall be authenticated by the common seal of the company being affixed thereto; and such authentication shall take place at the first ordinary meeting, or at the next subsequent meeting of the company, and so from time to time at each ordinary meeting of the company."

Sect. 18 enacts, "That, if the interest in any share have become transmitted in consequence of the death or bankruptcy or insolvency of any shareholder, or in consequence of the marriage of a female shareholder, or by any other lawful means than by a transfer according to the provisions of this or the special act, such transmission shall be authenticated by a declaration in writing, as hereinafter mentioned, or in such other manner as the

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cient, to entitle the plaintiff to recover, to prove that the defendant was, at the time of making the call, the holder

directors shall require; and every such declaration shall state the manner in which and the party to whom such share shall have been so transmitted, and shall be made and signed by some credible person before a justice, or before a Master, or Master Extraordinary, of the High Court of Chancery; and such declaration shall be left with the secretary, and thereupon he shall enter the name of the person entitled under such transmission in the register of shareholders; and for every such entry the company may demand any sum not exceeding the prescribed amount; and where no amount shall be prescribed, then not exceeding five shillings; and until such transmission has been so authenticated, no person claiming by virtue of any such transmission shall be entitled to receive any share of the profits of the undertaking, nor to vote in respect of any such share as the holder thereof."

Sect. 27 enacts, "That, on the trial or hearing of such action or suit, it shall be sufficient to prove that the defendant, at the time of making such call, was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given, as is directed by this or the special act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever; and thereupon the company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period."

Sect. 28 enacts, "That the production of the register of shareholders shall be *primâ facie* evidence of such defendant being a shareholder, and of the number and amount of his shares."

Sect. 33 enacts, "That a declaration in writing by some credible person not interested in the matter made before any justice, or before any Master, or Master Extraordinary, of the High Court of Chancery, that the call in respect of a share was made, and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was declared and confirmed in manner hereinbefore required, shall be sufficient evidence of the facts therein stated; and that such declaration and the receipt of the treasurer of the company for the price of such share shall constitute a good title to

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of shares, which the defendant undoubtedly was. The object of the 28th section was merely to facilitate the mode of proof; and the plaintiffs might shew the fact by other evidence. *The Cheltenham and Great Western Union Railway* v. *Price* (*a*) does not apply, because that was a decision before the passing of the 8 & 9 Vict. c. 16, and the only evidence produced was the register; but here the defendant, by letter, claims to be and is entered on the register as the owner of shares, and this on the draft register before the first call. [*Parke*, B.—The 8th section of the act says, "that every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and" (not "or") "whose name shall be entered on the register of shareholders, shall be deemed a shareholder of the company." Now, whatever may be the case as to original subscribers, (and I am disposed to think that the words "and whose name" would apply to such parties), undoubtedly, in the case of a party becoming a proprietor of shares by transfer, it is essential to his being a shareholder that he should be on the register; and then the question is, when does the document become a register within the statute? surely not until it is sealed.] The object of sealing is to protect the company, and to authenticate the shareholders, as is evident from the 18th and 33d sections. [*Parke*, B.—What is the meaning of "holder of shares" in the 27th section?] The interpretation clause, sect. 3, says that it shall mean "shareholder, proprietor, or member of the company."

such share; and a certificate of proprietorship shall be delivered to such purchaser, and thereupon he shall be deemed the holder of such share, discharged from all calls due prior to such purchase; and he shall not be bound to see to the application of the purchase-money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale."

(*a*) 2 Car. & P. 55.

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Montagu Chambers and *Bramwell*, contrà, were not called upon.

PARKE, B.—This rule must be made absolute. These companies, as soon as they have got their act of Parliament, appear perfectly satisfied, and never trouble themselves by looking into the clauses of their act to see what is to be done by them. Now, by the 8th section of the Companies' Clauses Consolidation Act, all persons who have subscribed to the capital of the company, or have otherwise become entitled to a share in the company, and whose names have been entered on the register of shareholders, become shareholders, which the interpretation clause explains to mean, "shareholders, proprietors, or members of the company." Then, the 9th section directs the company to enter in a book, to be called "The Register of Shareholders," the names of all persons entitled to shares in the company, with the number of shares to which each shareholder is entitled, which book is to be authenticated by the common seal of the company; and this register is, by the 28th section, made *primâ facie* evidence of a party therein named being a shareholder in the company. This, however, is not conclusive evidence, because it is open to a party on the register to shew that his name was inserted there without his consent. By the 27th section, the company must, in actions for calls, prove that the defendant was a shareholder in the company at the time the call was made; that is, a shareholder in the sense of the 8th and 9th sections. Consequently, before they can call upon a party to pay calls, they are bound to give him a title to his shares by putting his name on their sealed register. This certainly is so in the case of a transferee of scrip certificates, and probably is so also in the case of an original subscriber. In the present case, however, it is unnecessary to say more than that in the case of a transferee it is so, and that he is not liable for calls made before his name is entered on the sealed register

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In the present case the defendant's name was not entered on the sealed register until after the first call was made; consequently this rule must be made absolute.

ALDERSON, B., and PLATT, B., concurred.

Rule absolute.

COURT OF EXCHEQUER.

Michaelmas Term, 1847.

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BAYLIFFE *v.* BUTTERWORTH.

Nov. 16th, 20th, & 23rd.

If there be at a particular place an established usage in the manner of dealing and making contracts, a person who is employed to deal or make a contract there has an implied authority to act in the usual way. The plaintiff, a sharebroker at Liverpool, at the request of the defendant, who resided at Oldham, sold for him scrip shares to *C.*, a Liverpool broker, which were not delivered on the day agreed upon, and *C.* in consequence bought other scrip at the market price, and then claimed and received from the plaintiff the difference between the contract and the market price. It was the usage amongst brokers at Liverpool to be responsible to each other upon such contracts, of which usage the defendant was cognizant—*Held*, that the defendant was liable for such difference.

Semble, per *Parke* and *Rolfe*, BB., that he would be bound by such usage, though he might not be cognizant of it.

ASSUMPSIT for work and labour, for money paid, and on an account stated.

Plea, non assumpsit.

The cause was tried at the last Liverpool Spring Assizes, before *Rolfe*, B., when it appeared that the defendant, a linen-draper residing near Oldham, on the 3rd of July, 1845, employed the plaintiff, a sharebroker at Liverpool, to sell for him twenty scrip certificates of shares in the Huddersfield and Manchester Railway, at 6*l.* 15*s.* per share. The plaintiff did accordingly on that day sell the shares, which were to be paid for on the next settling day, to Messrs. Finlay, sharebrokers at Liverpool. The shares not having been delivered by the defendant on the day agreed upon, Messrs. Finlay, on the 20th of July, bought the same number of

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scrip shares at the market price of that day, 11*l.* 12*s.* 6*d.* per share, and then called upon the plaintiff to pay them the difference between the contract price and that at which they had purchased them, amounting to 97*l.* 10*s.* The plaintiff accordingly paid this amount, and then brought the present action to recover it back from the defendant, together with his commission of 2*l.* 10*s.*

At the trial it was proved, that, at the Liverpool Stock Exchange, there was a usage for brokers to be answerable to each other for the fulfilment of contracts entered into between them for third parties, for the sale and purchase of scrip, and there was some evidence of the defendant's knowledge of this usage. No question was raised on that point, but it was contended by the defendant's counsel that he was not bound to pay the sum of 97*l.* 10*s.*; and, at all events, that it could not be recovered as money paid; and in support of this position a case decided by *Alderson*, B., at York was cited. The learned judge was of that opinion, and directed a verdict for the plaintiff for the amount of his commission, 2*l.* 10*s.*, reserving leave to the plaintiff to move to increase the damages by 97*l.* 10*s.*

In Easter Term *Knowles* accordingly obtained a rule nisi to increase the amount of damages.

Martin and *C. Saunders* now shewed cause(*a*).—The plaintiff cannot recover the difference between the contract price and the market price of the 20th of July, it having been paid by him to Messrs. Finlay without any authority from the defendant, either express or implied. The defendant cannot be bound by the usages of the Liverpool share-market, not being a sharebroker. In *Child* v. *Morley*(*b*), it was held that a broker who contracts with others for the sale of stock at a future day by the authority of his

(*a*) Before *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Rolfe*, B.

(*b*) 8 T. R. 610.

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principal, who afterwards refuses to make good the bargain, cannot, by paying the difference to such third persons, maintain an action on an implied assumpsit against his principal for the amount. And *Lawrence*, J., there says, "If Child acted as broker or agent for Morley, which he legally might, and his contract would then be valid within the statute, he ought in that case to have permitted Morley to settle or not with the purchasers, as he pleased, and the plaintiff should not have taken upon himself to pay the money without the consent of his principal, more especially after that principal had refused to pay it. In this general view of the case the payment by the plaintiff would be at his own peril, and he could not recover in this action as for money paid to the use of the defendant." [*Parke*, B.—In that case there was no evidence, as in this, of any such custom. With respect to the defendant's knowledge of the custom, there are cases in which a party has been held bound by a usage of which he knows nothing; as, for instance, the usage at Lloyd's. Besides, if knowledge of the custom were necessary to make the defendant liable, there was ample evidence of such knowledge; and if the point had been made at the trial, and had been submitted to the jury, they would have so found. In *Sutton* v. *Tatham* (*a*), it was held by Lord *Denman*, and *Littledale*, J., that a person who employs a broker on the Stock Exchange impliedly gives him authority to act in accordance with the rules there established, though such principal may himself be ignorant of such rules; and Lord *Denman* there said, "I think a person employing one who is notoriously a broker must be taken to authorise his acting in obedience to the rules of the Stock Exchange." And *Littledale*, J., also said, "A person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether he himself is or not acquainted with the rules by which

(*a*) 10 Ad. & E. 27.

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brokers are governed.] There the broker was authorised to do his best. In *Lightfoot* v. *Creed* (*a*), the defendant contracted with the plaintiff to transfer stock on a certain day, and upon his failing to do so the plaintiff bought the stock and sued the defendant for money paid for the consequent loss. It was held that the action could not be maintained. [*Parke*, B.—The plaintiff there had no authority from the defendant to buy the stock. The principle upon which the action for money paid is maintainable was well considered by this Court in *Brittain* v. *Lloyd* (*b*).]—They also cited *Bowlby* v. *Bell* (*c*).

Knowles and *Crompton*, contrà, were not called upon.

PARKE, B.—I am of opinion that this rule must be made absolute. There is no doubt, that, if the plaintiff be considered as standing in the place of surety to the defendant, and the plaintiff made the payment for him, the defendant would be bound to repay him. This was not a case of the sale of registered shares, but of scrip certificates. The plaintiff was bound to pay the purchaser; and the only question is, whether the plaintiff is to be considered as surety for the defendant or not. Evidence was given at the trial that it was the established usage on the Stock Exchange at Liverpool, that brokers were responsible to each other for their principals in sales of this description; and if there was any doubt as to the existence of this usage, that point ought to have been made at the trial. No question, however, of this kind was made; we may therefore assume such to have been the established usage at that place. Now it is clear law, that if there is an established usage in the manner of dealing and making contracts at a particular place, a person who is employed to deal or make contracts

(*a*) 8 Taunt. 268.
(*b*) 14 M. & W. 762.
(*c*) Ante, Vol. 4, p. 692; *S. C.*, 3 C. B. 284.

there, has an implied authority to act in the usual way; and if it be the usage that he should make the contract in his own name, he has an implied authority to do so. Supposing it were necessary to shew a knowledge by the defendant of the particular usage, that point ought to have been made at the trial; but in fact there was here evidence for the jury that the defendant did know of it. It is not, however, necessary to decide whether the defendant would be bound by a usage of which he was not cognizant. It appears to me, that a person who authorises another to contract for him, authorises him to contract in the usual way. There are, indeed, some cases which apparently look the other way: *Bartlett* v. *Pentland* (*a*) is one of them; that, however, was not with respect to the usage of the Stock Exchange, but of insurance brokers; and it was there held that the custom of set-off which prevailed at Lloyd's Coffee-house was not binding on a party who was not shewn to be cognizant of it, or to have assented to it; but that is a different question from the present, which is one of contract. There is also the case of *Gabay* v. *Lloyd* (*b*): that was an action on a policy of insurance. It was found by the special verdict, that a certain usage as to the construction of such policies prevailed amongst the underwriters at Lloyd's, and that the policy in question was effected there; but it was not found that the plaintiff was in the habit of effecting policies at that place. The Court held that this usage was not sufficient to bind the plaintiff. But that case differs from the present, the question here being as to the authority which the plaintiff received. I have said this in order to shew my concurrence in the opinions of Lord *Denman* and Mr. Justice *Littledale*, in the case of *Sutton* v. *Tatham*, although it is not necessary to determine the same point here; because, if knowledge were necessary in this case, there was sufficient evidence to shew that the defendant knew the usage of the

(*a*) 10 B. & C. 760. (*b*) 3 B. & C. 793.

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Stock Exchange at Liverpool. I am therefore of opinion that the rule ought to be made absolute.

ALDERSON, B.—I am of the same opinion. It is clear, that, if the plaintiff were guaranteed by the defendant and paid the money, an action for money paid would lie. A person who deals in a particular market, must be taken to deal according to the custom of that market; and he who directs another to make a contract at a particular place, must be taken as intending that it should be made according to the usage of that place. In the present case, it is the custom at Liverpool for brokers to be guaranteed by their principals.

ROLFE, B.—I took a different view of this case at the trial from that which I now entertain. I understood that it was governed by a case which had been tried before my Brother *Alderson*, at York. But I rather think it did not appear there that there was any evidence of any usage, or whether the parties knew of it or not. Undoubtedly that would make a difference. If there was no evidence of such usage, and the broker paid the money, the defendant could not be made liable for such payment unless by express contract. The dealing here was at a particular place, and the course of dealing was known to the parties. It may be immaterial whether the course of dealing was known to the parties or not. In *Sutton* v. *Tatham* the defendant did know of the usage. I fully concur in the law as laid down in that case by Lord *Denman* and Mr. Justice *Littledale*.

POLLOCK, C. B.—I abstain from giving any opinion, because I was absent when this case was argued; but I may state that I fully agree with the principles which have been laid down by the Court.

Rule absolute (*a*).

(*a*) See *Pollock* v. *Stables*, post, 352.

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EXCHEQUER CHAMBER.

Michaelmas Term, 1847.

WILLIAMS *v.* ARCHER.

Nov. 29th & 30th.

In detinue for scrip shares, where it appeared that, after action brought and before verdict, the scrip had been delivered up to the plaintiff—*Held*, that the jury might, as a measure of damages, take into consideration the difference in value of the scrip shares between the time of the demand and refusal, and the time of the delivery of them to the plaintiff, and that in such case the jury might find the facts specially, and confine themselves to an assessment of damages for the detention.

THIS was a writ of error from the Court of Common Pleas on a bill of exceptions to the ruling of *Cresswell*, J.

The declaration was in detinue to recover 250 scrip certificates in the North Wales Railway Company.

Plea, non detinet; upon which issue was joined.

At the trial, before *Cresswell*, J., at the London sittings after Hilary Term, 1845, it appeared that the demand and refusal to deliver up the shares was made on the 17th of May, 1845, on which day they were worth 3*l.* 5*s.* each; that the scrip were subsequently, and before the trial, delivered up to the plaintiff under an order of *Cresswell*, J., when they were only worth £1 per scrip certificate. By the order of Mr. Justice *Cresswell* it was ordered, that, "on the delivery of the articles claimed in this action and payment of costs to be taxed, including the costs of the application, the plaintiff should be subject to the costs of this action unless he should recover more than nominal damages."

Upon these facts the learned judge directed the jury that the true measure of damages was the loss that the plaintiff had sustained by not having the certificates when demanded; and that they might, if they pleased, measure that loss by the difference between the price at the time of the demand and refusal, and the price at the time when the scrip certificates were delivered up. To this ruling a bill of exceptions was tendered by the defendant's counsel, on the ground that "the loss of the contingent profit which the plaintiff

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might have made and gained by the sale of the said scrip certificates, if he had been in possession thereof as aforesaid, was not and is not recoverable in this action; and the said justice ought to have directed the jury aforesaid, that, upon the evidence aforesaid, nominal damages only were and could be recovered."

The entry of the finding and judgment was, "that the within-named defendant did detain the chattels and writings in the declaration mentioned, &c., before and at the commencement of this suit, and from thence continually until and at the respective times of pleading the within declaration and the within plea, and from thence until the 25th day of November, A.D. 1845, when the said defendant delivered the said writings and chattels to the said plaintiff under and by virtue of an order of the Honourable Sir *Cresswell Cresswell*, Knight, one of the justices, &c., in that behalf made, whereby the said justice ordered, that, upon delivery of the articles claimed in this action and payment of the costs to be taxed, including the costs of the said application, the said plaintiff should be subject to the costs of this action unless he recovered more than nominal damages for the detention; and they assess the damages of the plaintiff, on occasion of the detention of the said writings and chattels, over and above his costs and charges by him about his suit in this behalf expended, to 562*l.* 10*s.*, and for those costs and charges to 40*s.* Therefore it is considered that the said H. Archer do recover against the said D. Williams his said damages, costs, and charges by the sums aforesaid, in form aforesaid assessed, and also £138 for his costs and charges of the said Court here adjudged of increase to the said H. Archer with his assent, which said damages, costs, and charges in the whole amount to £703; and the said D. Williams in mercy," &c.

The writ of error was argued by *Willes*, for the plaintiff

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in error(*a*).—The direction of the learned Judge was wrong, for substantial damages cannot be recovered in this form of action after the delivery up of the thing detained. The jury are to assess the value of the goods, and the defendant has the option either of delivering them up or of paying their value. The jury are also to find damages for the detention; but it is clear that they ought not to assess as damages any part of their value, since they have been given up. Secondly, the form of the judgment is erroneous. It ought to be in the alternative that the plaintiff do recover the goods or their value and his damages, and not damages alone: *Jones* v. *Dowle*(*b*); Selwyn's Nisi Prius, vol. 1, p. 667, 9th ed.

Peacock, for the defendant in error, *contrà*.—The direction of the learned judge was correct. The plaintiff is entitled to recover in this form of action the goods or their value, and also damages for their detention. He cannot recover the goods or their value in the present case, as the goods have been delivered up before verdict; but there is no objection to his recovering damages for their detention, the correct estimate of which is the difference in price of the scrip certificates at the time of the demand and of the re-delivery. Secondly, the form of the judgment is proper, as the jury find that the scrip had already been returned. They could not have awarded a re-delivery, and their only course was to assess damages for the detention. [*Parke*, B.—At present we have no doubt that the direction of the learned Judge upon the question of damages was perfectly correct.]

Willes, in reply.

Cur. adv. vult.

(*a*) Before *Parke*, B., *Alderson*, B., *Coleridge*, J., *Wightman*, J., *Platt*, B., and *Erle*, J.

(*b*) 9 M. & W. 19.

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PARKE, B., now delivered the judgment of the Court.—In this case we intimated our opinion yesterday, that the direction of the learned Judge was correct, in telling the jury that they might take into consideration the difference in value of the scrip certificates between the time of the demand, and that of the delivery of them to the plaintiff; but a doubt occurred to us whether the finding of the jury, and the judgment thereupon for damages only, was correct. It differs from the ordinary modern form of verdict in detinue, which finds the value of the chattels and damages for the detention; whereupon the judgment is, that the plaintiff recover the chattels, or the sum expressed as their value if he cannot have the chattels again, and also his damages and costs. Here there can be no such judgment; and a doubt arose whether the special facts could be found, as is done in the present case, on the issue on non detinet; the only question on such issue apparently being, whether the chattels were detained, and if so, what are the damages for the detention. We do not think, on reference to the old authorities, that the objection ought to prevail. In Roll. Abr. tit. "Detinue," it is said, that, in detinue of charters, on the issue on the detinet, if it be found that the defendant has burnt the charters, judgment shall not be to recover the charters, for it appears that he cannot have them, but he shall recover the value of the land in damages. A reference is however made to a contrary decision in the Year Book, 17 Edw. 3, 45 b. In that case the jury found that the charters were burnt by the defendant. *Schardlow*, J., said, that the issue was only on the detinet, which detinue was found, and the judgment, it was agreed by the Court, should be to recover the charters and damages to ten marks, and that the defendant should be restrained to return the charters.

By analogy to this case, the judgment given for the plaintiff on the record would be wrong. But the case does

not appear to be law; for Brooke, in his Abridgement, tit. "Detinue de Biens," pl. 25, says, that *Newton* and *Paston*, in 21 Hen. 6, 36, (both justices of Common Pleas), say, that if in detinue of charters the charters are burnt, he, the plaintiff, shall recover all in damages. The like is laid down in 3 Hen. 6, p. 19, pl. 13; and Brooke, and also Rolle, in their Abridgments, evidently adopt that position as good law. If that be so, and it seems to us that it is, we may, on the authority of that case, hold, that the jury may find the facts specially, whereby a re-delivery of the goods to the plaintiff becomes impossible, and so confine themselves to an assessment of damages. If the jury can do so where the destruction of the chattel takes place, and so it cannot be recovered in specie, they may do so also where its previous re-delivery renders the recovery of the chattel useless.

Our judgment rests on the fact of re-delivery, and we do not take into consideration my Brother *Cresswell's* order.

Judgment affirmed.

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COURT OF EXCHEQUER.

Trinity Term, 1847.

June 12.

CLARKE *v.* CHAPLIN.

An allottee of shares in a Company paid his deposit to the Company's bankers, and received from them the following receipt:—"Received £100, to be placed to the account of *W. C.*, &c.; for Messrs. Jones, Loyd, & Co. £100 (signed) A. Palmer.—This receipt not transferable. The party to whom these shares are allotted is requested to attend immediately at the offices of the Company, with this receipt, to sign the parliamentary contract, when the receipt will be exchanged for the shares." In an action by the allottee to recover back the deposit, the scheme having been abandoned—*Held*, 1st, that this document was a receipt for money deposited in the hands of a banker, to be accounted for on demand, within the exemption of the 55 Geo. 3, c. 184, and did not require a stamp; 2ndly, that the plaintiff was bound to produce the letter of allotment, or to give secondary evidence of its contents, in order that the Court might see what the terms of the contract were under which the deposit was made.

ASSUMPSIT for money had and received, and on an account stated.

Plea, amongst others, non assumpsit.

The cause was tried before *Pollock*, C. B., at the London Sittings after Hilary Term, 1847, when it appeared that the action was brought to recover from the defendant, a director of the London and Westminster Water Company, a joint-stock company, £100, being a deposit paid by the plaintiff on an allotment of twenty shares in the Company to him in February, 1841. The scheme having been abandoned, the action was brought to recover back the deposit as upon a failure of consideration. It appeared that the plaintiff, having applied for and had allotted to him twenty shares in the Company, on the 8th of February, 1841, according to the directions in the letter of allotment, paid to the Company's bankers, Messrs. Jones, Loyd, & Co., a deposit of £100, which was carried to the account of the directors, when he received from Messrs. Jones, Loyd, & Co. the following document:—

"The London and Westminster Water Company,

London, February 8th, 1841.

"Received one hundred pounds, to be placed to the

account of William Chaplin, Thomas Devear, James Patrick M'Dougall, Joseph Workman, and J. Perry Clarke.

"For Messrs. Jones, Loyd, & Co., £100.

"A. PALMER.

"This receipt not transferable. The party to whom these shares are allotted is requested to attend immediately at the offices of the Company, No. 7, St. Martin's-lane, Trafalgar-square, with this receipt, to sign the parliamentary contract, when the receipt will be exchanged for the shares. Monday, the 8th of February, is the last day for such attendance."

This document, stamped with an agreement stamp, was tendered in evidence, and its reception objected to by the defendant, on the ground that it was a receipt, and ought to be so stamped. This objection was overruled. The plaintiff then gave in evidence a letter from him to the defendant, dated the 8th of February, 1842, stating that he had not received his shares, and requesting a return of his deposit; to which the following answer from the secretary of the Company was returned and given in evidence:—

"7, St. Martin's-lane, Feb. 17, 1842.

"SIR,—Mr. Chaplin has handed to me a letter, addressed to him by you, relative to the Water Company. I beg to inform you that every effort is being made to go to Parliament this session. I expect every day to have to write officially to you to request your signature to the parliamentary list. In the meantime, should you call or send here, you will be furnished with a new prospectus and Mr. John Stephenson's second report.

"I am, Sir, yours, &c.

"G. W. BLANCHE (Hon. Sec.)"

The letter of allotment, which was in the hands of the defendant's attorney, was not produced, nor was evidence

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given of its contents. Under these circumstances, it was objected on behalf of the defendant, that the plaintiff could not recover without proof of the letter of allotment, as it contained the terms under which the deposit was paid. This objection was overruled, the learned judge being of opinion that the letter of the 17th of February amounted to an admission that the deposit was to be returned if the project was not proceeded with in the then session of Parliament.

The jury, under his Lordship's direction, found a verdict for the plaintiff for the amount of the deposit, leave being reserved to the defendant to move to enter a nonsuit.

A rule having been obtained accordingly by Sir *Frederick Thesiger*, to enter a nonsuit or for a new trial,—

Martin and *Willes* now (*a*) shewed cause.—First, the document given by Messrs. Jones, Loyd, & Co. is a mere acknowledgment of a deposit having been made with them; it is not a receipt which discharges, and consequently requires no receipt stamp: *Tomkins* v. *Ashby* (*b*), *Huxley* v. *O'Connor* (*c*), *Flather* v. *Stubbs* (*d*). Besides which, this document comes within the exemption from duties on receipts of the Stamp Act, 55 Geo. 3, c. 184, Schedule, part 1, title "Receipt," which exempts from duty receipts given for money deposited in the Bank of England, or in the Bank of Scotland, or Royal Bank of Scotland, or in the bank of the British Linen Company in Scotland, or in the hands of any banker or bankers to be accounted for on demand; provided the same be not expressed to be received of or by the hands of any other than the person or persons to whom the same is to be accounted for. [*Pollock*, C. B.—This case appears to me clearly to come within that exemption.] Secondly, it was not necessary that the plaintiff should have produced the letter of allotment, the scheme having become

(*a*) Before *Pollock*, C. B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

(*b*) 6 B. & C. 541.
(*c*) 8 Car. & P. 204.
(*d*) 2 G. & D. 290.

abortive. Nothing has been allotted to the plaintiff, so that the terms of the letter of allotment are immaterial: *Walstab* v. *Spottiswoode* (*a*), *Nockells* v. *Crosby* (*b*).

Gurney and *Ogle*, contrà.—A receipt stamp was necessary. The payment was made in discharge of a debt; it was a payment for shares to be delivered. The document does not come within the exemption of the act. As the money was not deposited "to be accounted for on demand," Messrs. Jones & Co. were not liable to account to the plaintiff for the deposit; and if liable to account to the defendant, he was not the party making the deposit. *Abbott*, C. J., ruled in *Catt* v. *Howard* (*c*), that an accountable receipt for money given by the agent of one who receives money from different customers for the purpose of investing in annuities, &c., required a stamp. [*Alderson*, B.—The receipt in that case was not an accountable receipt.] Secondly, the letter of allotment ought to have been produced, or its absence accounted for. The deposit was made upon certain terms contained in the application for shares and the letter of allotment; and as the plaintiff relies on the abandonment of the contract, he ought to have shewn, what the terms of that contract were, in order to shew that there had been a failure of consideration. [*Platt*, B.—The letter of allotment may have authorised a retention of the deposit by the defendant for five years.]

POLLOCK, C. B.—As to the production of the letter of allotment, we will take time to consider that question. With respect to the other point, I think a receipt stamp was not necessary.

ALDERSON, B.—I also think that a receipt stamp was unnecessary in this case. The money was to be accounted

(*a*) Ante, Vol. 4, p. 321; *S. C.*, 15 M. & W. 501.
(*b*) 3 B. & C. 814. (*c*) 3 Stark. 3.

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for on demand. Chaplin might have drawn it out at any time. The receipt was a banker's accountable receipt.

ROLFE, B., and PLATT, B., concurred.

Cur. adv. vult. on the other point.

July 3rd. ROLFE, B., now delivered the judgment of the Court.—This was an action by an allottee of shares to recover back his deposit. At the trial leave was given to the defendant to move to enter a nonsuit, if the Court should be of opinion that there was not evidence to entitle the plaintiff to recover. The objection upon which we reserved our opinion was, that the letter of allotment was not given in evidence; and we think that that was certainly a most material document in order to entitle the plaintiff to recover back the deposit as upon a failure of consideration, because, unless the letter of allotment was produced, it was impossible to say whether the consideration had failed or not. It was suggested that this defect was remedied by reason of a letter from the plaintiff to the defendant on the 8th of February, 1842, and the reply thereto on the 17th of the same month. [His Lordship read the letters.] The *Lord Chief Baron* thought that the answer of the secretary might possibly be sufficient to entitle the plaintiff to recover, as being some evidence of an admission on the part of the defendant, that the terms of the contract were, that, if they did not proceed with their act in that session, the deposit was to be returned. The Court do not concur in that view of the case, but think the letter of allotment should undoubtedly have been produced; or, if it could not have been produced, secondary evidence should have been given of its contents, in order to see what the terms of the contract were, and how the plaintiff brings himself in a position to recover back this money. The Court have thought it the best plan to modify the rule; and if the plaintiff thinks fit to pay the costs of the trial, then instead of a nonsuit he may have a new trial. The rule

will therefore be absolute to enter a nonsuit, unless within ten days the plaintiff elects to pay the costs of the former trial, and then he may have a new trial on payment of those costs.

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Rule accordingly.

COURT OF EXCHEQUER.

Hilary Term, 1848.

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VANE *v.* COBBOLD.

Jan. 14.

ASSUMPSIT for money paid, money had and received, and on an account stated.

Plea, non assumpsit.

The cause was tried before *Pollock*, C. B., at the London Sittings after Michaelmas Term, 1847; when it appeared that the action was brought by an allottee of shares in the Midland and Eastern Counties Railway Company, against one of the managing committee of that Company, to recover a return of deposits on forty shares as upon a failure of consideration. The scheme, which was for the construction of a railway from Cambridge to Worcester, was projected in 1845, when a committee was formed for carrying the project into effect, and the Company was provisionally registered.

On the 2nd of September, 1845, the plaintiff applied for fifty shares in the undertaking, and on the 1st of October received a letter of allotment appropriating to him forty shares, and requiring him to pay 2*l.* 12*s.* 6*d.* per share on or before the 16th of that month; and stating, that in

An allottee of shares in a Railway Company, provisionally registered, the prospectus of which stated the capital to be £1,500,000, in 60,000 shares, duly signed the subscribers' agreement authorising a disposition of the deposits; at that time 35,000 shares only had been allotted, on 18,160 of which deposits had been paid, although the time for payment of the deposits had expired. These facts were not communicated to the plaintiff when he executed the subscribers' agreement. The scheme having proved abortive—*Held*, in an action to recover a return of the deposits, that the suppression of the above facts did not amount to fraud, so as to avoid the subscribers' agreement.

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default of payment the allotment would be cancelled. On the 16th of October the plaintiff paid the deposit on his shares and received his scrip; and on the 4th of November signed the subscribers' agreement, which contained the usual stipulations as to the disposition of the deposits. The deposits had been expended conformably with the subscribers' agreement.

The prospectus of the Company stated the capital to be £1,500,000, in 60,000 shares of £25 each, with a deposit of 2*l.* 12*s.* 6*d.* per share; but only 35,000 shares were ever allotted, of which deposits on 18,160 only were paid. The directors applied for, but failed in obtaining, an act of Parliament enabling them to carry out the scheme.

Under these circumstances, it was contended at the trial, that the permitting the plaintiff to sign the subscribers' agreement, without informing him that a portion only of the shares had been allotted, and deposits on those allotted had not all been paid, amounted to such a fraud as avoided the subscribers' agreement; and as the scheme had proved abortive, the plaintiff was entitled to recover back his deposits.

The learned Judge, however, was of opinion that no case of fraud had been made out, and directed a nonsuit.

Martin now moved (*a*) to set aside the nonsuit, and for a new trial.—Although it may be difficult to say what constitutes fraud in these cases, it is submitted, that there was fraud in obtaining the plaintiff's signature to the subscribers' agreement by the suppression of a material fact; namely, that only 35,000 shares had been allotted, and that deposits on 18,160 shares only had been paid up. The *suppressio veri* in this case is equivalent to an *allegatio falsi*. [*Parke*, B.—The fraud must be such as would render the party committing it responsible. That fraud may be either the party's own moral fraud, or be committed by his sanc-

(*a*) Before *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Platt*, B.

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tioning some misrepresentation made by others, as by his receiving money from another, knowing that it had been paid over to that other person in consequence of a misrepresentation. Where an agent makes a false representation, and the principal knows that another person would not have paid the money in question but for that misrepresentation, it is fraud in the principal, although it might not be sufficient to render him indictable for obtaining money under false pretences.] Then, according to that doctrine, the omission of the officer of the Company to inform the plaintiff of the real state of the facts was such a *suppressio veri* as to amount to fraud. The plaintiff had reason to believe that a sufficient number of shares had been allotted to enable the Company to go on with the project, and that the deposits on those allotted had been paid; inasmuch, therefore, as the subscribers' agreement was fraudulent and the scheme has become abortive, the plaintiff is entitled to recover back his deposits, as upon a failure of consideration: *Nockells* v. *Crosby* (*a*), *Walstab* v. *Spottiswoode* (*b*), *Garwood* v. *Ede* (*c*).

ALDERSON, B.—Every one knows that in cases of this kind parties begin to subscribe the deed long before all the deposits are collected; the directors might therefore have honestly supposed that the rest of the allottees would come in after the plaintiff had signed the deed. Besides, there is no doubt that the plaintiff would have executed the deed, even had he known that deposits on 18,160 shares only had been paid.

PARKE, B.—Few deeds are executed at the time when all the shares are allotted.

PER CUR.—There is no ground for a rule.

Rule refused.

(*a*) 3 B. & C. 814. (*b*) Ante, Vol. 4, p. 321; *S. C.*, 15 M. & W. 501. (*c*) Ante, Vol. 5, p. 134.

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COURT OF EXCHEQUER.

Trinity Term, 1848.

June 6. MACHU *v.* THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

Every person actually employed under the sanction of a carrier, to do what he has undertaken to do, is a servant in his employ, within the 8th section of the Carriers' Acts, (11 Geo. 4 & 1 Will. 4, c. 68).

A bale of silk was delivered at a country station of a Railway Company, to be delivered to the plaintiff in London. It arrived at the London terminus of the Company, and was there placed by the Company's servants in a van of C. & H., who were employed by the Company to deliver all goods arriving at that terminus. The van was under the charge of J., a porter of C. & H., and by him and others the bale was stolen. The Company were in the habit of sending a delivery ticket with each parcel, which ticket was headed with the Company's name, and signed C. & H., and gave a list of porters, including J., and stating that any servant of the Company taking more than therein stated, would be dismissed:—*Held*, that J. was a servant in the employ of the Company, within the 8th section of the Carriers' Act.

Semble, that the delivery ticket did not operate by way of estoppel against the Company, that J. was their servant.

CASE.—The declaration stated, that the defendants were common carriers of goods and chattels for hire; and the plaintiff, on the 23rd of November, 1846, at the Andover-road station of the London and South-Western Railway, caused to be delivered to the defendants, and the defendants then accepted and received, a certain bale of silk, of the value of £150, to be safely and securely carried and conveyed by the defendants to London, and there safely and securely to be delivered to the plaintiff, for certain reasonable reward &c.; yet the defendants, not regarding their duty in that behalf, did not nor would safely or securely carry or convey the said bale of silk to London aforesaid, nor there safely or securely deliver the same to the plaintiff; but, on the contrary, the defendants so carelessly and negligently behaved and conducted themselves in the premises, that, by and through the carelessness, negligence, and default of the defendants, &c., the said bale of silk, &c., became and was wholly lost to the plaintiff, &c.

The defendants, besides the general issue and a traverse of the delivery of the goods, pleaded, 3rdly, That the said bale of silk in the declaration mentioned, therein alleged to

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have been received by the defendants as such common carriers as aforesaid, contained only goods and chattels, and property of a certain description, to wit, the silk in the said declaration mentioned, and exceeded in value the sum of £10; and that the said bale of silk was therefore, to wit, on the day and year in the declaration mentioned, delivered by the plaintiff to the defendants as common carriers by land of goods for hire, to be carried from and to the places in the declaration mentioned, at a certain office or receiving-house of the defendants for the receiving of goods, to be carried by them as such common carriers as aforesaid, to wit, the said Andover-road station of the defendants; that before and at the time when the said bale of silk was so delivered at the said office of the defendants as aforesaid, the defendants had caused to be affixed, and there was affixed, according to the form of the statute in such case made and provided, in legible characters, in a public and conspicuous part of the said office, a notice, whereby the defendants notified that a certain increased rate of charge therein mentioned was required to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of, amongst other things, silk exceeding the value of £10; and that at the time of the delivery of the said bale of silk at the said office of the defendants as aforesaid, the value and nature thereof was not declared by the person sending or delivering the same, and that neither the said increased charge, nor any engagement to pay the same, was accepted by the person receiving the said bale of silk at the said office: Verification. The plaintiff took issue on the first two pleas; and to the third replied, "That whilst the said bale of silk was in the charge and possession of the defendants as such common carriers as aforesaid, to wit, &c., the same was unlawfully and feloniously stolen, taken, and carried away by a certain then servant of the defendants, then in the employ of the defendants, to wit, one Thomas Johnson, whereby the same was not safely and securely carried or conveyed,

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or delivered as aforesaid, but then was and now is wholly lost to the plaintiff, solely by reason of the said felonious act of the said Thomas Johnson," &c.

The rejoinder traversed, "that whilst the said bale of silk was in the charge and possession of the defendants as such common carriers, &c., the same was unlawfully and feloniously stolen, &c., by a then servant of the defendants, then in their employ," &c.

The cause was tried before *Pollock*, C. B., at the London Sittings after Michaelmas Term, 1847, when it appeared that the action was brought by the plaintiff, a silk trimming manufacturer, carrying on business at Bunhill-row, London, for the loss of a bale of thrown silk sent to him at that address, on the 23rd of November, 1846, by a silk-throwster at Whitechurch, in Hampshire, and delivered to the defendants at their office, at the Andover-road station. The usual charge for the carriage of a bale of that size, 2*s.* 3*d.*, was paid; its value, £125, was not declared, nor was any extra charge on account of its value paid, pursuant to the 2nd section of the Carriers' Act, (the 11 Geo. 4 & 1 Will. 4, c. 68), and to a notice stuck up in the Company's booking-office. On the arrival of the train on the 24th of November at the Vauxhall terminus of the South-Western Railway, the silk was placed in one of Messrs. Chaplin & Horne's vans, and delivered to Thomas Johnson, a porter of Messrs. Chaplin & Horne, by Stanbury, one of the Company's servants, for delivery. Messrs. Chaplin & Horne were carriers employed by the Company to deliver in London all goods arriving at the station. The defendants had, on former occasions, sent goods to the plaintiff, with delivery tickets in the following form:—The delivery order, on the present occasion, was not given in evidence.

"(114). London and South-Western Railway Company.

"Southampton, Gosport, Andover, &c.—Every morning before eight, and afternoon before six o'clock.

"From Hambro' Wharf, Lower Thames-street," &c.

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Here followed a notice from the Company, that they would not be liable for certain articles, including silk, above the value of £10, unless the value thereof should be declared, and the increased charge paid, and concluding thus: "The delivery of the goods will be considered complete when the same are unloaded out of the waggon, dray, or cart, and placed at the door of the consignee; the cellaring or warehousing them afterwards will be at the owner's risk. Any servant of the Company taking more than is stated in this ticket will be dismissed.

"*Notice.*—The Company are not responsible for any parcel above the value of £10, unless declared as such at the time of booking, and entered and paid for accordingly. It is requested that any irregularity may be notified immediately to

"CORNELIUS STOVIN,
"General Manager of Traffic.

"Mr. Machu, Bunhill-row, to South-Western Railway Company.

"1846:

"Jan. 16th.—One truss silk, —— paid on ——, 2*s*.

"JAMES BEEDY,
"CHARLES GOODWIN,
"WILLIAM LEE,
"GEORGE CLAY,
"*Thomas Johnson*,
"GEORGE FRY,
. . . Porters.

"Goods conveyed to or from any part of London, by addressing a line to Mr. Ritches, at the delivery office as above.

"CHAPLIN & HORNE, Agents."

The silk, it appeared, never reached its destination, but was stolen by Thomas Johnson and others somewhere between the railway terminus and the plaintiff's place of business. Under these circumstances, it was contended, on

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behalf of the defendants, that Johnson was the servant of Messrs. Chaplin & Horne, and not of the Company, within the 8th section of the Carriers' Act, and consequently that they were not liable for his felonious act. His Lordship, however, was of a contrary opinion, and directed the jury, that, if they should find that the silk had been stolen by Johnson, they ought to find a verdict for the plaintiff. The jury found that the silk had been stolen by Johnson, and a verdict was thereupon entered for the plaintiff for the value of the silk, leave being reserved to the defendants to move to enter a verdict for them on the third issue.

Martin having, in Hilary Term last, obtained a rule accordingly,

Sir *F. Thesiger*, with whom was *E. H. Woolrych*, now shewed cause, and contended, first, that there was abundant evidence to warrant the finding of the jury, that Johnson was the servant of the Company within the meaning of the 8th section of the Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 68 (*a*); and secondly, that the Company had by their

(*a*) The 1st sect. enacts, "That no mail-contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of, or injury to, any article or articles, or property of the descriptions following, that is to say, gold, &c., silk, &c., contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach, or other public conveyance, when the value of such article or articles, or property aforesaid, &c., shall exceed the sum of £10, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail-contractor, &c., or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried, &c., the value and nature of such article or articles, or property, shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

The 2nd sect. enacts, "That when any parcel or package containing any of the articles above specified shall be so delivered,

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delivery ticket held him out as their servant, and were estopped from denying that fact. [He was then stopped by the Court.]

Martin, (with whom was *Montague Smith*), in support of the rule.—[*Parke*, B.—You have to contend, first, that the defendants are not estopped by their delivery ticket. If that is merely evidence that Johnson was their servant, you have, on the other hand, proof that he was the servant, not of the defendants, but of Chaplin & Horne, who could have discharged him at their pleasure. But then it may be contended, that that written document, as against the defendants, acts as an estoppel; and that Johnson, so far as this transaction is concerned, must be taken conclusively as against them to have been their servant. Secondly, if the defendants are not estopped, then comes the question on the construction of the statute. *Pollock*, C. B. —In *Pickard* v. *Sears* (*a*), Lord *Denman* says, "But the

and its value and contents declared as aforesaid, and such value shall exceed £10, it shall be lawful for such mail-contractors, stage-coach proprietors, and other common carriers, to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving-house, where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office, shall be bound by such notice without further proof of the same having come to their knowledge."

The 8th sect. provides, "That nothing in this act shall be deemed to protect any mail-contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct."

(*a*) 6 Ad. & Ell. 469.

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rule of law is clear, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time;" and that principle was acted on in *Gregg* v. *Wells* (*a*) and *Coles* v. *The Bank of England* (*b*). Johnson was here held out as the servant of the Company.] But the delivery ticket is that of Chaplin & Horne, being signed by them, and therefore there was no holding out by the defendants of Johnson being their servant, but, on the contrary, a holding out of his being Chaplin & Horne's servant. The principal question, however, turns on the construction of the Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 68. And it is submitted, that, in order to render the carrier liable within the 8th section of that statute, there must be a felonious taking by a servant of his—by one who stands in the relation of servant to the master. [*Pollock*, C. B.—If a coachman lets a stranger drive, and an accident occurs whilst he is driving, would the master be liable? *Platt*, B.—Or if the coachman were to stop at an alehouse and employ another to drive, would the master be liable for any accident occurring?] Perhaps he would, because the injury would be caused by the wrongful act of the servant; but where the relation of master and servant does not exist, the person who is damaged must look to the person who causes the wrong and who is liable: *Rapson* v. *Cubitt* (*c*). Johnson was not a servant of the Company within the meaning of the 8th section of that act. That he was not the servant, in fact, is admitted; nor can he be taken to be so within the statute. In *Laugher* v. *Pointer* (*d*), the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to

(*a*) 10 Ad. & Ell. 90.
(*b*) Id. 437.
(*c*) 9 M. & W. 710.
(*d*) 5 B. & C. 547.

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a third party. It was held by *Abbott*, C. J., and *Littledale*, J., (*Bayley*, J., and *Holroyd*, J., dissentientibus), that the owner of the carriage was not liable. *Littledale*, J., there says, "If this accident had been occasioned by a coachman who constituted a part of the defendant's own family, there would be no doubt of the defendant's liability; and the reason is, that he is hired by the master, either personally or by those who are entrusted by the master with the hiring of servants, and he is therefore selected by the master to do the business required of him. This rule applies not only to domestic servants who may have the care of carriages, horses, and other things in the employ of the family, but extends to other servants whom the master or owner selects and appoints to do any work or superintend any business, although such servants be not in the immediate employ or under the superintendence of the master . . . . . This, however, is not the case of a man employing his own immediate servants, either domestic servants or others engaged by him, to conduct any business or employment or occupation carried on by him. For the jobman was a person carrying on a distinct employment of his own, in which he furnished men and let out horses to hire to all such persons as chose to employ him. This coachman was not hired to the defendant; he had no power to dismiss him; he paid him no wages. . . . . The cases referred to before Lord *Ellenborough* only shew, indeed, the owner of the horses to be liable, but it may be said the traveller is liable also. I think not. The coachman or postillion cannot be the servant of both; he is the servant of one *or* the other, but not the servant of one *and* the other. The law does not recognise a several liability in two principals who are unconnected." Which doctrine has been recognised in the Queen's Bench in *Milligan* v. *Wedge* (*a*), and by this Court in *Quarman* v. *Burnett* (*b*). [*Pollock*, C. B.—Suppose the Company

(*a*) 12 Ad. & Ell. 737. (*b*) 6 M. & W. 499.

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had called a cab, and had given these goods to the cabman to deliver, and he stole them; would the Company be liable?] No; for the cabman would not be their servant, but their agent. [*Platt*, B.—The 8th section does not merely say that the carriers shall be liable for the felonious acts of their servants, but of servants in their employ; whereas the 1st section uses the expression "his, her, or their bookkeeper, coachman, or other servant."] The word "servant" in the 8th section must be taken as ejusdem generis with bookkeeper or coachman in the 1st section. The true test is, would Chaplin & Horne be liable for the loss of this parcel? They clearly would: *Coates* v. *Chaplin* (*a*). [*Rolfe*, B.—The principal point there argued was, whether the plaintiff was the proper party to sue?] But there the plaintiff recovered in fact, which shews that Chaplin & Horne would be liable. [*Pollock*, C. B.—Is it clear, that, if a servant of a carrier loses a parcel, the carrier is responsible only on the ground of the relation of master and servant existing between the parties?] He is liable, undoubtedly, as an insurer, and by the custom of the realm; but that principle does not apply to the present case, which depends upon the statute. [They also cited *Reynell* v. *Lewis* (*b*); *Wyld* v. *Hopkins* (*c*); *Muschamp* v. *The Lancaster and Preston Junction Railway Company* (*d*).]

POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. The question to be decided cannot be disposed of by merely producing this document, and contending that it must be taken from its contents that there has been a holding out of the person who stole the silk as the servant of the Company. The real question is this: it seems that Chaplin & Horne had contracted with the Railway Company to do part of their business; that they were

(*a*) 3 Q. B. Rep. 483.
(*b*) Ante, Vol. 4, p. 351.; *S. C.*, 15 M. & W. 517.
(*c*) Ante, Vol. 4, p. 351.
(*d*) Ante, Vol. 2, p. 607; *S. C.*, 8 M. & W. 421.

not servants, but agents of the Company; that the persons whom Chaplin & Horne employed, paid, gave orders to, and had powers to dismiss, were still further removed from the Company, and were servants of Chaplin & Horne, and not of the Company. Then Mr. *Martin* says, that the act of Parliament, which has been cited, gives a distinct indemnity from responsibility to the Railway Company as carriers—an indemnity against responsibility for loss, unless certain conditions are complied with; that the 8th section re-imposes their common-law liability under certain circumstances only; and that, in order for the plaintiff to bring himself within the protection of that section, he must shew a felonious act done by an actual servant of the Company. In proceeding to construe that statute, I have given the fullest scope in my mind to Mr. *Martin's* argument; and, with a distinct perception of the force of the argument derived from the strong expression of Mr. Justice *Littledale* in *Laugher* v. *Pointer*, I still think this rule ought to be discharged on the general ground—and I prefer taking that ground to any other—that here was an employment of Johnson by the Company, as appears from the upper part of the paper, leaving out of consideration for the present all that relates to the holding him out as servant of the Company. Taking it that this document proves that the Company received this parcel in the country, with an undertaking on their part to deliver it at Bunhill-row, in London, I think that, for the purpose of that delivery, within the true meaning of the 8th section, Johnson was a servant in the employ of the Company. A different state of things from that existing at the time when this statute was passed has sprung up by the introduction of railways; but the general object of the statute was to give protection to carriers for small parcels of great value placed under their care without any notice of their value, and thus compelling them, by reason of the custom of the realm, to incur considerable risk for a small amount of profit; and the Legislature has effected this by requiring the value of all such parcels to be declared,

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and an additional sum paid to the carrier by way of insuring their safe delivery; and nothing can be more just than such an enactment. But in order to guard the public against the consequences of effecting such insurance—for one consideration for insurance is the disclosure to the carrier's servants of the value of the parcel to be carried—the Legislature, while it says that the carrier shall not be liable unless the article sent is insured, namely, by the payment of a certain price for its carriage, goes on to provide, that, whether it is insured or not, the carrier shall still be liable in case of any felonious act of a coachman, guard, bookkeeper, porter, or any other servant in his employ; and I am of opinion, that, in point of law, this liability cannot be got rid of by the introduction of the term "agent" or "sub-contractor," or by giving a fanciful name to the employment of any one employed to discharge the duty undertaken by the carrier. In the course of the argument I intimated my opinion, that if a carrier receives goods and enters into contracts for their carriage, and by a sub-contract transfers to some one else the whole duty which he has undertaken to perform, I think, all the parties who come in under that subsequent contract, whether directly by the sub-contract or otherwise—all the parties actually employed in doing the work which the carrier undertook to do by himself or his servants, are all servants in his employ within the 8th section. In the present case, therefore, Chaplin & Horne must, for the purposes of this action, be taken to be servants of the Company. Chaplin & Horne are employed by the Company to take the goods from the railway station and deliver them, and are servants in the employ of the Company within the meaning of the statute, and any person employed by Chaplin & Horne would be so also; and although, in consequence of the contract with the porters having been made by Chaplin & Horne, the Company could not give directions to those porters or dismiss them, yet substantially they were servants of the Company, doing that which the Company had agreed to do. On the general question, therefore, turning on the

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mere construction of this act, when I find that this Railway Company received these goods in the country and undertook to deliver them in Bunhill-row, everything done during the transit of the goods is done by the Railway Company or their servant; and the substitution of any other word, such as "agent," "sub-contractor," &c., makes no difference, if the act is done by persons acting as servants of the Company, under whatever name they may contract to perform that work. If I entertained any doubt on the general question, (which I do not), still in this particular case, where the document which has passed between the plaintiff and the Company describes the persons who are to perform this work as their servants—for it says, "any servant of the Company taking more than is stated in this ticket will be dismissed"—the inference from the document is, that the person who was to deliver was a servant of the Company; when also I find in that ticket the plaintiff made debtor to the Railway Company for the carriage of the goods, and the very porter who stole them is described in it as a porter of the Company, I must, on this document, take him to be their porter. This, however, is not a question of any importance, because I think that whoever discharges their duty for them must be taken to be their servant within the meaning of the act of Parliament. The plaintiff is, therefore, entitled to recover in this action, and the rule must be discharged.

ROLFE, B.—I am of the same opinion. The first difficulty raised here proceeds on the notion that the Company, by delivering a ticket, in which they described, amongst others, Johnson as their porter, were either estopped from disputing the fact that he was their servant, or if not estopped, still that that evidence was so conclusive on the point that no other reasonable inference could be drawn from the facts. Now I fairly own, that, if the matter rested on this point, I should have entertained very considerable

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doubt, as there was clearly no estoppel here; that document was mere matter of evidence, and, so far as relates to the mere question of the fact of service, the evidence was abundant to shew that Johnson was the servant of Chaplin & Horne, not of the Company. But I think that it is immaterial to discuss that point. I have much considered the subject since the last argument, and do not now decide on the spur of the moment. The Company, as appears from the evidence, received these goods at the Andover-road station, and undertook to deliver them at Bunhill-row, in London. The statute must be construed with respect to this Railway Company as it would have been construed in former times, if A. B. had entered into a similar contract. It appears that the practice of the Company was, that they by their railway carriages brought the goods entrusted to them as far as the Vauxhall station, and that they were in the habit of employing Chaplin & Horne to deliver those goods in the different parts of London; Chaplin & Horne employ Johnson, who, on his road to Bunhill-row, privily steals the goods; and then comes the question, is the carrier, that is, the Company, responsible? Are they responsible for that theft? Now it is clear, that, independently of the statute, the defendants would be liable for the loss, as a breach of duty; but the statute limits their responsibility, by saying, that in certain cases, of which this is one, they, the carriers, shall not be liable for loss unless an increased price for the carriage shall have been paid. But the 8th section provides, "That nothing in this act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, bookkeeper, porter, or other servant in his or their employ." Was Johnson, therefore, who stole these goods, a bookkeeper, porter, or other servant in the employ of the Company? I think he was. I quite admit what was said

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by Mr. *Martin*, that the question of liability for the acts of agents and servants has of late years been fully considered; and I entirely adhere to what was said by Mr. Justice *Littledale* in *Laugher* v. *Pointer*, and by this Court in *Quarman* v. *Burnett*, and which was afterwards acted on in *Rampson* v. *Cubitt*; but I do not think those cases apply to the present. Those were cases of this nature: a wrongful act was done by some one against whom the party injured had of course a remedy, and the question there was, had he also a right to recur to any one else? To which the answer in such case is, "Yes, he has, against the person acting as master of the party doing the damage, who was at the time he did it employed as his servant, not against any one else." There, however, the right of the party to sue originates in the wrongful act of the servant; here the right against the Railway Company arises by virtue of a contract into which they have entered; to which their defence is, that the goods to which it related were of a certain quality, and that the person by whom they were stolen was not their servant. Let us look, then, to the meaning of the word "servant," within the 8th section of the statute. Mr. *Martin* says, that no person can be deemed servant of a carrier within that section, unless he is actually hired, retained, and paid by him. But it is impossible that such can be the meaning of the section, for it says, that nothing in the act contained shall protect from liability for loss or injury arising from the felonious acts of any coachman, guard, bookkeeper, porter, or other servant, in his employ. What is the meaning of that? The Legislature felt, that, having given to the carrier protection against responsibility for the loss of goods which are not properly insured, it was unnecessary to say that the absence of such insurance should not protect him against his own felonious act, but they proceed at once to speak of the felonious acts of bookkeepers or other servants in his employ. A large construction ought to be put on those words; they must be

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taken to mean bookkeeper, porter, or other servant actually employed under the sanction of the carrier, to do what he has undertaken to do. The Legislature contemplated that a carrier could, or might, take goods into his charge and hand them over to some one else to deliver for him; and the statute did not mean to shield him if he stole them himself, nor, as I think, if they were stolen by any person whom he employs as his substitute. If that construction be not adopted, this anomaly would follow. Nothing was more common under the old system than for the coachman to hire the guard, or the guard to hire the coachman, (I forget which); and if a person were to lose anything sent by a public coach, and sued the proprietor, the defendant might say, "I did not hire the guard or coachman, and therefore am not responsible?" So in the case of a bookkeeper, the Company might say, that the bookkeeper supplied the other servants. When, therefore, the Legislature used the word "servant" in this section, they meant to use it in an extensive sense, the party being clearly liable if he steals the goods himself, and, it being his ordinary duty as carrier to carry them himself, he shall be responsible if any one in his employ steals them. I think that Chaplin & Horne were servants of the Company within the meaning of the 8th section of this statute, and so was every person employed by them to do what they contracted to do by themselves or others acting under them; and that the plaintiff is, therefore, entitled to judgment.

PLATT, B.—I am of the same opinion. This statute, when considered with attention, can be very plainly expounded, and should be expounded with reference to the duty of carriers, according to the custom of the realm; for without this statute a carrier would be liable for the safety of the goods until their arrival at their place of destination. Suppose in this case the goods, instead of having been stolen, had been injured by careless treatment between the railway

station and the place of delivery, can any one doubt, but that if they had been insured the defendants would have been liable for that? And why? Because the carmen who drove the horses, in taking the goods from the station to the ultimate place of destination, were the agents and servants of the Company for that purpose. How would it be laid in the declaration? That the defendants were guilty of negligence by their servants. It would be difficult to draw the declaration by saying that the injury arose from the omission of care on the part of the person sued, or from the negligent act of a servant employed by him to do the work. It would be impossible in the declaration to charge the defendant otherwise than I have stated. These porters are therefore, for some purposes, the agents of the Company. And why? Because they have entered into a contract in respect of these goods, which depends on, and refers to, the contract in question. It is totally different from the case of the jobmaster: he drives the horses by his postillion, and the person who hires them has no control over him in any way. And every one who owns horses or a vessel is bound to place them under such a governance as shall prevent any injury occurring from negligence to any subject of the Queen; and if any does occur, the master who placed the negligent person there becomes himself responsible. Those cases depend on a totally different principle, for there the mischief is done by the person who drives or authorises the driver; and therefore, as regards the public, the jobmaster is the master of the driver. But the present case arises out of a relation created by contract: a carrier undertakes to carry goods from A. to B.; and then it is said, because the goods were stolen by a servant of a sub-contractor employed by the carrier, the carrier is not responsible. It is clear this is not affected by the decisions on cases of negligence, and we must therefore look, and see what did the statute mean. Its meaning was this: as the great responsibility cast on carriers, without due notice of the value of goods committed

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to them, operated as a great hardship—for if the carrier knew that a parcel bailed to him was of great value, as, for instance, a casket containing jewels, he would not leave it exposed so that a thief might remove it—it was thought just by the Legislature that the carrier should have notice of the value of the article; and if he had not, that he need not use extraordinary diligence, and should not be responsible if it was lost. And the mode they took of doing that was by requiring the bailor to pay a premium for the additional care to be employed in the carriage of the goods. But the Legislature say to the carrier, "Although we give you all this protection in that case, we will not extend it to those cases where the loss has been by felony." That is the meaning of the 8th section; for its effect is to take out of the operation of the statute all losses occasioned by felony on the part of persons who, in case of negligence, might be treated as servants of the carrier; for I say that the persons so employed are his servants within this section, although it is unnecessary for the decision of this case to go so far. I have given every attention to Mr. *Martin's* vigorous and ingenious argument; but, still I think that, considering this statute from one end to the other, the matter is most plain. Any person employed by a carrier, to perform the contract into which he enters, is a servant in the employ of the carrier within the meaning of this statute. Just look at the dangerous consequence of an opposite construction—for one moment consider the powers of these Companies: they may let out every single part of their carriers' business to others, who again may employ their own servants; and if we were to hold that those persons are not the servants of the Company, they might purchase a complete immunity from responsibility for every single theft that might be committed, from one end of their line of railway to the other, under the pretence that those who committed the thefts were not in their service at all. It would be a most monstrous and dangerous doctrine to hold that these persons, who enter into

all the profits of the carrying, shall, by a sub-contract unknown to the other party, get rid of their responsibility. As to the estoppel, I think that the ticket produced did not operate as such, but was mere matter of evidence.

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Rule discharged.

COURT OF EXCHEQUER.

Trinity Term, 1847.

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DUKE (Knt.) and Others *v.* FORBES.

Nov. 12th.

ASSUMPSIT.—The declaration stated, "that before the making of the promise by the defendant hereinafter mentioned, to wit, on the 20th day of August, A. D., 1845, the plaintiffs had agreed together, with divers, to wit, 200 other persons, to endeavour to form and establish a certain joint-stock company or partnership undertaking, for the making, constructing, and working a certain railway, to be called the "Dorking, Brighton, and Arundel Atmospheric Railway," and to endeavour to obtain an act of Parliament

A declaration in assumpsit stated, that on a certain day the plaintiffs had agreed with 200 other persons to endeavour to establish a railway company, and to obtain the necessary act of Parliament; the capital to be

raised by shares of £20 each, to be allotted by a committee of management, and a deposit of 2*l.* 2*s.* per share to be paid by each allottee. That the plaintiffs, being the committee of management, on &c., at the request of the defendant, allotted him thirty-five of the said shares, upon certain terms agreed upon between them, namely, the payment of the deposit by the defendant on a certain day to certain bankers. The declaration then averred mutual promises, the readiness and willingness of the plaintiffs to perform the terms on their part, and breach, the non-payment by the defendant of the deposit.

Held, first, on general demurrer, that the declaration was good, though it did not allege that the Company was provisionally registered, pursuant to the 7 & 8 Vict. c. 110, or that it was formed before the date of that act.

Secondly, that the contract disclosed by the declaration was one upon which the plaintiffs might sue alone, without joining the other members of the Company.

Thirdly, held, on special demurrer, that the declaration was not bad for not alleging that the Company was continuing when the shares were allotted.

Nor, fourthly, for not shewing with sufficient certainty, that the defendant accepted the allotments.

Nor, fifthly, for not stating what the terms were which the plaintiffs promised to fulfil.

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for that purpose, the said railway not being capable of being constructed without the authority of Parliament, and the capital of which said proposed Company, or partnership undertaking, was to consist of a certain sum of money, to wit, £1,000,000 sterling, to be divided into 50,000 shares of £20 each, and upon which a deposit of 2*l.* 2*s.* for each and every share was to be paid by such persons respectively as should apply for and to whom the said shares should be allotted by a committee of management of the said proposed Company; that, before and at the time of the defendant's application for shares and the making of his said promise as hereinafter mentioned, the plaintiffs formed and were the committee of management of the said proposed Company; that, before the making of the promise by the defendant as hereinafter mentioned, to wit, on the 8th day of October, A. D. 1845, the defendant applied to the plaintiffs, then forming and being such committee of management as aforesaid, and requested them to allot to him, the defendant, fifty of the said shares in the said proposed Company, and then undertook to accept the same, or any less number that might be allotted to him; and thereupon heretofore, to wit, on the 25th day of November, A.D. 1845, the plaintiffs, at the request of the defendant, allotted to him thirty-five of the said shares in the said Company, upon certain terms then agreed upon by and between the plaintiffs and the defendant, that is to say, that a deposit of 2*l.* 2*s.* upon each and every of the said shares so allotted to him as aforesaid, making in the whole the sum of 73*l.* 10*s.*, should be paid by him, the defendant, on or before the 9th day of December, A. D. 1845, to the account of the said Company, to one of certain bankers then appointed and agreed upon in that behalf, to wit, the London and County Joint-stock Bank, Lombard-street, &c.; of all which premises the defendant afterwards, to wit, on &c., had notice. The declaration then averred mutual promises, and that although the plaintiffs were

always ready and willing to perform and fulfil the said terms in all things on their part, and although the said 9th day of December elapsed after the said promise of the defendant and before the commencement of this suit, of all which premises the defendant hath always had notice, yet the defendant, disregarding his said promise, did not, nor would, on or before the said 9th day December, pay, nor hath he since paid, to any or either of the said bankers, or at any of their banks, either in London or elsewhere, or to any other person, to the account of the said Company, the said deposit of 2*l.* 2*s.* per share, but hath wholly neglected so to do, by means of which said premises the plaintiffs have been and are greatly injured and damnified, &c.

To this declaration the defendant demurred specially on several grounds: but the points marked for argument were, first, that the declaration is bad, both in form and substance, and shews no sufficient cause of action; secondly, that the matters therein stated are not sufficient from which to imply the promise alleged; thirdly, that the only consideration stated for the promise declared on is the allotment to the defendant of shares in a company which the plaintiffs and others, once upon a time, before the making of the promise, had agreed with each other to endeavour to form, but which said agreement, and the formation of the said Company, and all endeavours to form the same, may (consistently with the said declaration) have been given up and abandoned long before the said allotment or promise, and that such consideration is insufficient to sustain the said promise; fourthly, that the declaration is wanting in certainty, in not stating whether the formation of the Company commenced before or after the coming into operation of the statute 7 & 8 Vict. c. 110; fifthly, that, if the formation of the Company commenced before the coming into operation of the 7 & 8 Vict. c. 110, all the several parties to the agreement for its formation, and not the plaintiffs alone, ought to have sued in this action; and if the formation commenced after the said act came into operation, then the declaration ought to have

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shewn that the plaintiffs were, according to the act, entitled to allot shares and receive deposits, and that the deposits sued for are such as the act authorises; sixthly, that the declaration ought to have shewn with certainty that the defendant accepted the allotment; seventhly, that the declaration ought to have stated with certainty the terms which the plaintiffs are alleged to have promised to fulfil, and been ready and willing to fulfil. Joinder, in demurrer.

June 9th. *Butt* (with whom was *Maynard*) now (*a*) appeared in support of the demurrer.—First, the declaration does not aver that the Company was provisionally registered under the 7 & 8 Vict. c. 110. The declaration is therefore bad; for, by the 23rd and 24th sections of that act, provisional registration is necessary previous to the Company making any contract for the allotment of shares, or taking monies by way of deposit for shares to be allotted. [*Pollock*, C. B. —If the Company have not been registered, the defendant should have so pleaded.] The compliance with the requisites of the statute is a condition precedent to the plaintiffs' right to sue, and they ought to have shewn on the face of the declaration that they have complied with the statute, otherwise the proceedings appear to be illegal. [*Pollock*, C. B.—In that case the defendant should have pleaded the illegality.] Secondly, the declaration does not shew that the contract (if any) was made with the plaintiffs alone. The facts disclosed shew that it was made with the whole of the parties associated together in the undertaking. Upon this *Woolmer* v. *Toby* (*b*) is in point. There the managing committee sued the defendant, an allottee of shares, for nonpayment of the deposits, and the Court of Queen's Bench made absolute a rule for a nonsuit, on the ground that the defendant had contracted with the provisional, and not with the managing, committee. In this case the allega-

(*a*) Before *Pollock*, C. B., *Alderson*, B., and *Rolfe*, B.
(*b*) Ante, Vol. 4, p. 713.

tion is, not that the deposits were to be paid to the plaintiffs, but to certain parties to the account of the Company. The implied promise, therefore, (if there be any), is not to pay the plaintiffs, but the whole Company. Thirdly, the consideration shewn in the declaration for the promise of the defendant is the allotment of shares in a proposed railway company; but, for anything which appears in the declaration itself, the whole scheme may have been abandoned, without any allotment at all of shares having been made. Fourthly, the declaration does not aver that the defendant accepted the allotment of shares. Fifthly, the declaration merely states the implied promise of the defendant to be "in consideration of the premises, and that the plaintiffs, at the request of the defendant, promised the defendant to fulfil the said terms on their part," and is therefore defective, as it ought to have stated, what the terms were.

J. Brown (with whom was *Martin*, Q. C.), in support of the declaration (November 12).—As to the first objection, the 7 & 8 Vict. c. 110, does not apply to companies formed before the 1st of November, 1844; and as the dates in the declaration are laid under a videlicet, for anything that appears on the face of it, this Company may have been formed prior to the 1st of November, 1844. Secondly, if it was intended to rely upon this illegality, it should have been pleaded and proved. In *Daintree* v. *Hutchinson* (*a*) it was held, that the objection that a coursing-match was illegal, under 16 Car. 2, c. 7, s. 2, could not be taken advantage of, unless specially pleaded. [*Pollock*, C. B.—The Apothecaries Act (the 55 Geo. 3, c. 194) prohibits any person practising or recovering charges as an apothecary, unless he has obtained a certificate of examination, or been in practice prior to the 5th of August, 1815. But a party who sues without a certificate need not aver that he was in practice

(*a*) 10 M. & W. 85.

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before the 5th of August, 1815.] So also, by the 6th of Anne, c. 16, no person can act as a broker within the city of London unless he is duly licensed pursuant to that act; yet, in a declaration by a broker for the recovery of his commission, it is not necessary to aver the fact of his being licensed: *Cope* v. *Rowlands* (*a*). So also, in declaring upon a contract to perform at a theatre, the fact of the theatre being licensed need not be averred: *Astley* v. *Weldon* (*b*). In Bac. Abr., tit. "Statute," (L.) 3, the true rule is laid down as follows:—"If a statute make certain circumstances necessary to the validity of an act which was valid at the common law without such circumstances, this does not alter the manner of pleading which was used before the making of the statute. A tenant for years cannot, since the 29 Car. 2, s. 3, assign over his term without doing it in writing: but, as he might have done this by parol at the common law, an assignment may be pleaded without alleging it to have been in writing; and it may be given in evidence that it was in writing." [He also cited Stephen on Pleading (*c*), and was then stopped by the Court upon that point.] With regard to the second point, if, as is objected for the defendant, the promise alleged in the declaration is merely one implied in law, nevertheless the facts shew that it results from an agreement made with the plaintiffs alone. In *Woolmer* v. *Toby* the question was altogether one of evidence, and not of pleading. That case is, therefore, distinguishable from the present. *Jones* v. *Robinson* (*d*), recently decided in this Court, shews that, although the consideration for a contract moves from several parties, one of them may sue alone, and allege a promise to himself. [*Pollock*, C. B.—In that case there was an express promise.] The third point, which is a formal objection, is, that it is consistent with all the allegations in the declaration that the proposed scheme

(*a*) 2 M. & W. 149.
(*b*) 2 Bos. & P. 346.
(*c*) Page 411, ed. 5.
(*d*) 17 L. J., (N. S.), Exch., 36.

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was abandoned before the shares were allotted to the defendant. But the Court will not presume this. The rule, that "things are presumed to continue in the same state until the contrary appear," is well established, and was recognised in the recent case of *Price* v. *Price* (*a*). The fourth point, that it does not appear with certainty that the defendant accepted the allotment of shares, is also a formal objection; but there is nothing in it, because this declaration expressly avers that the allotment was made at the defendant's request. As to the last objection, that as the declaration alleges the implied promise to be "in consideration of the premises, and that the plaintiffs, at the request of the defendant, promised the defendant to perform and fulfil the said terms on their part," it ought to have stated what those terms were; the "premises" are the real consideration, and the allegation, implying that there were other terms to be performed by the plaintiff than those stated in the declaration, may be rejected as surplusage. "Utile per inutile non vitiatur." In Chitty on Pleading (*b*) the rule is thus stated:—"Where part of an entire consideration, or one of several considerations stated in a declaration, is merely frivolous and void, without being illegal, and the residue is good, and extends to the whole of the promise, the void part will not vitiate the declaration, but may be rejected as surplusage, and the promise will be referred to and supported by that part of the consideration which is legally sufficient."

Maynard, in reply.—First, as to the illegality. Admitting that where the consideration stated in the declaration is such, that under one state of facts it may be legal, under another illegal, in such case the illegality must be pleaded; yet where the contract declared on can be legal under one state of facts only, the rule is different, and the declaration

(*a*) 16 M. & W. 242; 16 L. J., Exch., 99.
(*b*) Vol. 1, p. 301, ed. 7.

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must then aver all the circumstances necessary to shew its legality. The decision in *Daintree* v. *Hutchinson* cannot be supported to its full extent, because the declaration there shews the contract to be illegal; and it is sufficient that the illegality should appear on some part of the record. In an action upon the 19 Geo. 2, c. 37, for the insurance of a ship, where the insurer must have an interest in the subject-matter, such interest is usually averred. Upon this part of the case, *Cousins* v. *Nantes* (*a*), and *Craufurd* v. *Hunter* (*b*), are in point. So, in contracts for the sale of stock under the Stock-jobbing Act, (7 Geo. 2, c. 8), all the precedents contain an averment of possession in the party selling. The true principle is to be found in Com. Dig., tit. "Pleader," (c. 76), where it is said,—"The plaintiff, in his declaration, ought to aver every fact; without being informed of which, the Court cannot judge whether the plaintiff has cause of action." So, in all cases where any circumstances are required by the purview of an act to make it good, they ought to be averred; as where the stat. 1 Rich. 3, c. 1, makes a feoffment, &c., by cestui que use, of full age, sane, and at large, &c., good: he who pleads a feoffment, &c., by cestui que use, ought to aver that he was sane, &c. Then, as to the right of the plaintiffs to sue alone, the interest in the contract is in the whole body of persons forming the Company; the consideration proceeds from them, and this action, being by a portion of them, is therefore improperly brought. The case is governed by *Woolmer* v. *Toby*, for the facts which there came out in evidence, are here stated upon the record. [*Alderson*, B.—In *Woolmer* v. *Toby* the Court came to the conclusion that the promise was not in fact made to the plaintiffs. If a similar question arose in this case, and the defendant denied it, he would succeed.] *Bowen* v. *Morris* (*c*) is also an authority upon this point. As to the formal objections, there is nothing in the declara-

(*a*) 3 Taunt. 513. (*b*) 8 T. R. 13. (*c*) 2 Taunt. 374.

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tion to shew, that, at the time the shares were allotted, the Company was in existence; and the facts averred do not constitute any liability in the defendant to pay the deposit. Lastly, the consideration for the promise is insufficiently stated. It does not appear what the terms to be performed on the part of the plaintiffs, were; and the rule of pleading is, that the whole consideration for the promise must be stated. [*Pollock*, C. B.—I doubt whether it is always necessary to set out the whole consideration. In some cases it may be the whole agreement]. *Beech* v. *White* (*a*) is an authority upon the point. [He also cited *Figes* v. *Cutler* (*b*), (recognised in *M'Neill* v. *Reid* (*c*)), and *Roscorla* v. *Thomas* (*d*).]

POLLOCK, C. B.—I am of opinion that our judgment must be for the plaintiffs. Two objections are made to this declaration in matters of substance. The first is, that the declaration does not shew the Company to have been registered, as required by the 7 & 8 Vict. c. 110; and it is said that by that statute a company of this nature cannot allot shares until it is provisionally registered; but the answer to that objection is, that the statute is not retrospective, and applies only to companies formed after the 1st of November, 1844; and, for anything that appears to the contrary, this Company may have been formed before that time. This objection, if it really existed, should have been pleaded, viz. that the Company was formed after the passing of that statute, and was not registered in the manner required. But it is said, if that be so, the plaintiffs ought to have shewn, when the Company was formed, in order that it might appear that they were acting legally, and had power to allot shares; but I think the authorities cited by Mr. *Brown* shew that this objection is not well founded; and our constant experience

(*a*) 12 Ad. & E. 668.
(*b*) 3 Stark. N. P. 139.
(*c*) 9 Bing. 70.
(*d*) 3 Q. B. 234.

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is, that a party suing is not bound to anticipate matters of that kind, and that the objection should come from the other side by way of answer.

The second objection is, that the plaintiffs are partners with others, who ought to have sued jointly with them. But there is a contract shewn between the plaintiffs and defendant, for a consideration appears on the face of the declaration in respect of which the plaintiffs have a sufficient interest to sue the defendant. I think, therefore, that, on the face of the contract as stated, there is consideration sufficient to support the promise alleged, if such was actually made by the defendant. Objections in point of form have also been made, but I think they ought not to prevail. Mr. *Maynard* urged, that the declaration shews that certain terms were to be performed by the plaintiffs, without shewing what those terms were, and is therefore defective; but, when the declaration comes to be examined, it will appear that this objection is not well founded. I give no opinion as to whether a declaration, which merely referred to certain terms as part of the contract, and as forming also part of the consideration, would be open to a special demurrer. It might be doubted whether such a case would not come within the rule which has been long established, and was recognised in the case of *Cryps* v. *Baynton* (*a*), which was an action against the defendant for necessaries supplied to a third party, at his request; and the declaration, which averred generally that necessaries were supplied, was objected to, for not shewing what those necessaries were; the Court, however, decided that it was good, and the general allegation sufficient, in order to avoid multiplicities in pleading. But that point does not arise here, because I think there are terms fully stated in the declaration which are sufficient to support the promise. The allegation is this, that shares "were allotted to the

(*a*) 3 Bula. 31.

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defendant on certain terms then agreed upon between the plaintiffs and the defendant—that is to say, that a deposit of 2*l.* 2*s.* upon each and every of the said shares so allotted to him as aforesaid, making &c., should be paid by the defendant on or before the 9th of December, 1845, to the account of the said Company, to one of certain bankers, then appointed and agreed upon in that behalf, to wit," &c.; and it adds, "of all which premises the defendant had notice; and thereupon, in consideration of the premises, and that the plaintiffs, at the request of the defendant, then, to wit, on &c., promised the defendant to perform and fulfil the said terms on their part, the defendant then promised the plaintiffs to perform and fulfil the said terms on his, the defendant's, part." It is said, there may be more terms; but I think that such an objection cannot be taken advantage of on special demurrer, although it may be otherwise available; for instance, if, upon non assumpsit pleaded, it had appeared at the trial that there were other terms in the contract, there would be a variance between the declaration and the proof. If those terms required anything to be done, either expressly or by implication, the plaintiffs, no doubt, were bound to do what they promised; but if those terms did not require anything to be done, then the reference to them in the declaration is surplusage. The plaintiffs promised, to do all that on their part was to be done, they were not bound to ascertain the extent of their obligation, either express or implied. In my opinion, there was an implied promise to some extent; for instance, to continue their account at the bankers', or, if they changed their bankers, to give the defendant notice of it. If there was any implied promise, we cannot treat that allegation as surplusage, for implied terms are as good as those expressed. I think that none of the objections, either of substance or form, are well founded, and that the plaintiffs are entitled to judgment, upon this demurrer.

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ALDERSON, B.—I am of the same opinion. As to the question of illegality, it ought not to be implied; but, on the face of the declaration, we must presume the transaction to be legal. It may be that it is illegal, if the Company are not provisionally registered; but we do not know that it has not been so registered. It may be legal, even though not registered, if it was constituted before the 1st of November, 1844. If that is not the fact, the defendant should have shewn it by plea, which he has not done. As to the case of *Woolmer* v. *Toby*, that case does not govern the present one; there the proof did not correspond with the statement in the declaration: the declaration stated the contract to have been with A., B., and C.; whereas the proof was, that it was with D., E., and F. The statement here is, that the defendant's promise was made to persons being the managing committee. That is sufficient on demurrer, although very probably, if the plaintiffs were put to prove that fact, they could not do it, and it might turn out, as in *Woolmer* v. *Toby*, that the contract sued on was made with the plaintiffs and others jointly. I am also of opinion that the formal objections cannot be supported. If the allegation in the declaration had been, "in consideration of the premises, and of the plaintiffs undertaking to perform what was to be performed on their part, the defendant undertook and promised on his part," I should have taken time to consider whether the omission to specify the terms to be performed on the part of the plaintiffs would not have been a good objection, on special demurrer; but the allegation is, "in consideration of the premises, and that the plaintiffs, at the request of the defendant, promised the defendant to perform and fulfil the said terms on their part." The word "said" refers to the previous statements in the declaration; and those statements being sufficient to shew certain express or implied terms for this promise, those terms are virtually stated in the allegation of the promise

by the reference which it makes to those statements; therefore the special demurrer fails, because it seeks to object to the declaration as containing an insufficient statement of the terms, when it is clear that they are sufficiently stated.

ROLFE, B.—I am also of the same opinion. With respect to the objection, that the contract in this declaration should have been treated as a contract with all the members of the Company, and not as a contract with the managing committee, it may be in fact a contract with the Company; but there is no reason in point of law why the managing committee of such a Company should not enter into a contract with an allottee, to enure to the benefit of the Company. It does not appear from the declaration, that the committee of management were part of the Company, but only that the plaintiffs had agreed with other persons to form a company, of which they were to be part, and were to allot shares in it. It then states, that, in pursuance of that agreement, the plaintiffs allotted shares to the defendant, and that they performed all they had undertaken to perform, and that he had not performed, what he had undertaken to perform. Supposing the facts to be as stated, I think that there was such a contract with the plaintiffs, as will enable them to maintain the action. Then it is said, that this does not appear to be a legal contract, on account of the stat. 7 & 8 Vict. c. 110. But it is a good contract at common law, and illegal only if made after the passing of a particular act of Parliament, and if certain requisitions are not complied with. We are not to presume those facts, and if they exist they ought to come from the other side. The only point about which I entertained any doubt was, that it appeared by the declaration that certain terms were to be performed by the plaintiffs, and it was not shewn what those terms were. But the truth is, the declaration shews that there were no terms, except

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those already averred in it, and therefore the words implying those terms are surplusage. The case resembles that of *Ring* v. *Roxburgh* (*a*), where the declaration stated the defendant to be indebted for work and labour, &c., and also for certain diseases and other necessary things, &c., provided: and *Bayley*, B., said, that the allegation of the defendant being indebted for diseases, was mere nonsense and surplusage, and might be rejected; and that, if there were other good considerations in the count sufficient to support the count, it was good. I think that in this declaration there is a sufficient consideration to support the promise, the plaintiffs having done all that they contracted to perform.

Judgment for the plaintiff.

(*a*) 2 C. & J. 418; *S. C.*, 2 L. J., N. S., Exch., 168.

BAIL COURT.

Hilary Term, 1848.

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Jan. 27.

REG. *v.* THE JUSTICES OF CUMBERLAND.

Where, by the act of incorporation of a railway company, the directors were empowered to appoint and displace any of the officers of the company:—*Held*, that the appointment of an attorney to the company need not be under seal; therefore that a notice of appeal against a poor-rate, signed by the attornies of the company appointed by the directors, not under seal, was sufficient.

THIS was a rule calling upon the defendants to shew cause why a writ of mandamus should not issue, directing them to enter continuances and hear an appeal against an assessment to a certain poor-rate, made the 9th of September, 1847, and in which the Whitehaven Junction Railway Company were the appellants, and the overseers of the

township of Ellenborough were the respondents. It appeared from the affidavits that the appeal was duly entered for trial at the Michaelmas Quarter Sessions, 1847, for the county of Cumberland, and on its being called on, the notice of appeal, signed "Armistead and Musgrove, attornies for the above-named Whitehaven Junction Railway Company," was put in. The counsel for the respondents thereupon objected, that no valid notice of appeal had been proved, inasmuch as it had not been shewn that the gentlemen who signed the notice of appeal, acted upon a retainer under the corporate seal of the Company. The Court of Quarter Sessions acceded to this objection, and dismissed the appeal.

Cowling and *Ramshay* now shewed cause (*a*).—The notice of appeal must be signed "by the person or persons giving the same, or his, her, or their attorney, on his, her, or their behalf" (*b*). Was there, therefore, evidence before the Court of Quarter Sessions, that the attornies signing the notice of appeal were the officers of the Company?—and it is submitted that there was not. The Company, being a corporation, can make no valid appointment of an attorney, except under seal: *Arnold* v. *The Corporation of Poole* (*c*), Com. Dig., tit. "Franchise," (F.) 13: and inasmuch as no evidence was given that they acted under a sealed retainer, no valid appointment was shewn. It will be contended, on the other side, that the act of the Company enables the directors to appoint an attorney by parol, and the 83rd section (*d*) will

(*a*) Before *Wightman*, J.

(*b*) 41 Geo. 3, c. 23, s. 4.

(*c*) 4 M. & G. 860; *S. C.*, 5 Scott N. R. 741; 4 Dowl., N. S., 574.

(*d*) Which enacts, that "with respect to the exercise of the powers of the company, be it enacted, that the directors shall have the management and superintendence of the affairs of the company, and they may lawfully exercise all the powers of the company, except &c.; and, amongst other powers to be exercised by the directors, they may appoint and displace any of the officers of the company; they

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be relied on; but, though that section empowers the directors to appoint officers, the meaning of the section is, that they are to make the appointments, under seal. But in truth no evidence whatsoever was given of the appointment of the attornies in any manner whatsoever.

Martin (with whom was *Greig*), contrà.—The only objection made at the sessions was, that no appointment under seal was shewn; but that was not necessary, as the 7 & 8 Vict. c. lxiv, s. 83, enables the Company to appoint officers without seal. [He was then stopped by the Court.]

WIGHTMAN, J.—I think that this rule ought to be made absolute. Although the rule of law undoubtedly is, that, generally, corporations can bind themselves only by contract under seal, yet in the present instance an act of Parliament expressly gives the directors power to appoint and displace officers and enter into contracts for the execution of the works of the Company, and for all other matters necessary for the transaction of its affairs; and it appears to me clear that they may appoint an attorney, and that such appointment need not be under seal. Indeed this point was almost conceded, but it was said that no evidence at all of the appointment of the parties, who signed the notice of appeal as attornies, was given. Since, however, that objection was not taken at the Quarter Sessions, but only that an appointment under seal had not been shewn, it cannot avail the respondents now.

Rule absolute.

may fix the salaries of all officers, except the salaries of themselves; they may enter into contracts for the execution of the works of the company, and for all other matters necessary for the transaction of its affairs," &c.

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COURT OF QUEEN'S BENCH.

Michaelmas Term, 1847.

M'EWEN *v.* WOODS and Another.

3rd & 7th Dec.

ASSUMPSIT for money had and received.

Pleas—*first*, non assumpserunt; *secondly*, set-off.

The cause was tried at the Liverpool Summer Assizes, 1846, before *Cresswell*, J., when it appeared that the action was brought to recover back a sum of 148*l.* 10*s.*, paid by the plaintiff, a merchant, residing at Inverness, to the defendants, sharebrokers at Liverpool, as the purchase-money of certain scrip shares in the Limerick and Waterford Railway Company.

The shares were bought by the defendants in their own name, as sharebrokers for the plaintiff, of Messrs. Highfield & Co., on the 14th of August, 1845, in obedience to written instructions, given the day previously, to buy "for the next account;" and on the occasion of that purchase, a sold-note, of which the following is a copy, was forwarded by them, to the plaintiff:—

"Bought for J. M'Ewen, Esq., for account, 29th August,
30 shares in the Limerick and Waterford Railway, at
4*l.* 17*s.* 6*d.* per share, 2*l.* 10*s.* paid - - - £146 5 0
"Commission, 1*s.* 6*d.* - - - - - - - 2 5 0
£148 10 0"

On the 26th of August the plaintiff wrote to the defendants, (inclosing them a letter of credit for 148*l.* 10*s.*), as follows: "Enclosed I now send your letter of credit for 148*l.* 10*s.*,

The defendants, sharebrokers, pursuant to the orders of the plaintiff, purchased for him, in their own names, railway scrip for the next account-day (29th August); on the 26th of August the plaintiff transmitted to the defendants the purchase-money, and requested them to forward him the scrip. The Company had called in the scrip for registration on the 22d of August, and the sealed certificates were not issued until December, and in the mean time a call was made, which was necessarily paid by the vendors. The plaintiff, in December, being called on to take up the shares and pay

the amount of call, and 30*s.* for stamp, repudiated the transaction, on the ground "that it fell within his province to pay the call when and how he pleased, and without being subject to 30*s.* expenses," and the shares were resold at a loss, which was paid to the vendors by the defendants. In assumpsit for money had and received, to recover back the original purchase-money, —*Held*, that the contract was for the delivery of scrip on the 29th of August, if not then called in, otherwise of share certificates, as soon as they should be issued, and that the action was not maintainable.

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being the amount of thirty shares, Limerick and Waterford, bought by you on my account, of which please acknowledge the receipt, and at the same time forward the scrip;" to which the defendants replied, "We beg to acknowledge your favour of the 26th, inclosing draft on district bank here; amount, 148*l.* 10*s.* The Limerick and Waterford will be taken up and handed on delivery." The shares were not delivered on the account-day mentioned in the defendant's sale-note, (29th August), the scrip having been called in by the Company on the 4th of August, for the purpose of being registered, and of having sealed certificates issued in lieu. On the 14th of November the defendants wrote to the plaintiff: "The certificates of Limerick and Waterfords are only just freed from the offices since being called in. We are passing names this account-day for them, and expect to get all settled in a few days." On the 19th of December the plaintiff wrote to the defendant as follows: "On the 29th of November last I wrote to you, stating that I found the Limerick and Waterford scrip had not then arrived, and requesting it to be forwarded on receipt. It has, however, not come to hand, and I must therefore insist on having the scrip or my money by return of post." The registration and re-issuing were not completed until the middle of December; and in the mean time, (on the 28th of August), a call of £5 per share, payable on the 27th of September, was made by the Company, which was necessarily (*a*) paid by Messrs. Highfield & Co., and they, on the issuing of the sealed certificates, presented them, with the additional demand of £150 for the call, to the defendants, who on the 19th of December called upon the plaintiff to take up the shares, and to pay them the

(*a*) The 16th sect. of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), enacts, that "no shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him."

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amount of the call, £150, and 1*l.* 10*s.* for stamp. The plaintiff repudiated the transaction, by letter, dated the 22nd of December, in which he said, "I am very sorry to see that you should not feel disposed to let me have the Limerick and Waterford scrip on the terms of my purchase. It falls within my province to pay the call when and how I please, and that without being subject to 30*s.* expenses." The defendants declined to accept the shares, and they were resold by Messrs. Highfield & Co., at a loss of 226*l.* 10*s.*, which the defendants paid them. The action was brought to recover back the original purchase-money.

The learned Judge directed the jury to say, whether a reasonable time for completing the contract had elapsed, and they found that it had; the verdict was thereupon entered for the plaintiff, for 148*l.* 10*s.*, leave being reserved to the defendants to move to enter a verdict or a nonsuit. A rule nisi having been obtained,

Martin and *Cowling* now shewed cause (*a*).—The scrip ought to have been delivered on the 29th of August, and not being then delivered, the plaintiff had a right to say, "the authority which I gave you was to buy scrip deliverable on that day: if you have not got them, hand me back my money," and to recover it in this form of action. He was entitled to have the shares as they were on the 29th of August, and to judge for himself whether he would pay the call or not. The defendants did not lie under any liability to Messrs. Highfield & Co., and might have declined accepting the shares. They cited *Fletcher* v. *Marshall* (*b*).

Knowles and *Crompton*, contrà.—Money had and received will not lie to recover back the purchase-money of the shares, because it was not payable on request. The defendants had a right to apply the money in payment of the shares: *Sutton* v. *Tatham* (*c*). A principal, who has sent

(*a*) Before Lord *Denman*, C.J., *Coleridge*, *Wightman*, and *Erle*, Js.

(*b*) 15 M. & W. 755; post, 340.

(*c*) 10 Ad. & E. 27.

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money to his agent to pay to a third party, may, it is true, generally, at any time before payment over, stop it; but if the agent has done anything to render himself personally liable to that third party in consequence of the orders of the principal, he cannot do so: *Buller* v. *Harrison* (*a*). The contract here was with reference to the custom of the share-market; and the defendants having made the purchase with reference to that custom, and having become liable on that contract, cannot now be called on to repay the purchase-money. There was no recision of contract in this case, by reason of the impossibility of delivery on the day agreed, and the subsequent events rendering the payment of the call necessary before delivery. The defendants were bound to accept the shares if tendered within a reasonable time after registration, and therefore the payment by them was not in their own wrong.

Cur. adv. vult.

Dec. 7th. Lord DENMAN, C. J., now delivered the judgment of the Court.—This was a rule to enter a nonsuit, on the ground that, upon the facts, the action for money had and received could not be sustained.

The defendants, who were sharebrokers in partnership at Liverpool, had bought for the plaintiff, on the 14th of August, in pursuance of instructions from him, thirty Limerick and Waterford scrip shares, to be delivered on the next account-day, which was to be on the 29th of August, at the price, including their commission, of 148*l.* 10*s.* This sum the plaintiff transmitted to the defendants on the 26th of August, by letter, and requested them to acknowledge the receipt, and at the same time to forward to him the scrip. On the 22nd of August the Railway Company had called in the scrip for registration, which made a delivery to, or by the defendants impossible. Upon registration the scrip is turned into shares, and re-issues in the form of sealed certificates, which are transferrable only by deed.

(*a*) Cowp. 565.

The registration and re-issuing were not completed till the middle of December, and in the meantime the Company had made a call of £5 per share, which was necessarily paid by the parties selling to the defendants, and he presented the shares to them with the additional demand for the call. The plaintiff repudiating the transaction, the defendants declined to accept, and the shares were resold at a loss of £226, which the defendants paid to the original sellers. The action is brought to recover the 148*l.* 10*s.* From the correspondence put in, it appeared, that the plaintiff was apprised in due time of the scrip having been called in and the call made, and also that the call must be repaid to the sellers before the certificates would be delivered. From the same correspondence and the evidence, we think it must be taken that the defendants purchased in their own names, and were themselves personally responsible to the sellers. The money, therefore, was transmitted to the defendants to enable them to meet the liability which they had incurred at the request of the plaintiff and on his account. It was therefore not received in the first instance to his use. But it was urged, that the defendants, by their own misconduct, had produced a failure of the original consideration for which the money was sent; and this misconduct was said to consist in their having, in their own wrong, given time to the sellers for the delivery of this scrip, which by the contract was to be delivered as such on the 29th of August; but there is no foundation for this in fact. The non-delivery on the 29th of August, and all the consequences which followed, were owing to circumstances over which neither party had any control; and there is abundant evidence that the plaintiff was aware of those circumstances, and understood the contract to be made subject to them. The reasonable interpretation of the contract is, that it was for delivery of scrip on the 29th of August, if not then called in, otherwise of share certificates, as soon as they should be re-issued. Accordingly, if the plaintiff had enabled the defendants to pay for the shares when re-issued, by supplying funds to

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meet the call with which they had become saddled in the meantime, the defendants must have applied the money received for that purpose; and if they had neglected, it would have become money in their hands to the plaintiff's use. But he has wrongfully neglected to do so, and they have been compelled to add their own money to his in order to fulfil their contract; for the re-selling of the shares on their account by the original sellers, and their payment of the loss, is only another mode of so doing.

Upon these facts we think the action not maintainable, and that the rule must be absolute.

Rule absolute.

COURT OF EXCHEQUER.

Trinity Term, 1846.

June 27.

FLETCHER *v.* MARSHALL and Another.

A sharebroker employed to purchase shares does not thereby undertake to procure them absolutely, but only to use due and reasonable diligence to endeavour to do so.

The plaintiff, on the 30th of September, employed the defendants, sharebrokers at M., to procure scrip, and paid them the price. By the usage of the Stock Exchange at M., there are two settling days in each month, on which all share transactions are settled, although in some cases settlements are not enforced on those days. The next settling day after the 30th of September was the 14th of October. The scrip had been issued before the 14th, but none had reached M. before that day. The shares not being delivered on that day, the plaintiff rescinded the contract, and then sued the defendants for a return of the purchase-money. The Judge directed the jury, that, if they thought that fourteen days had been fixed by usage as a reasonable time, the plaintiff was entitled to recover; the jury having found a verdict for the plaintiff—*Held*, that the direction was right, and that the plaintiff might recover in an action for money had and received.

ASSUMPSIT.—The first count stated, that, on the 30th of September, 1845, divers persons, whose names are to the plaintiff unknown, had agreed together to form a certain joint-stock Company, to be incorporated by act of Parliament, for the construction of a certain railway, to wit, &c., [*describing the line*]; the capital of the said Company to consist of £1,000,000, in 40,000 shares of £25 each; which shares were to be allotted to such persons as should apply

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for the same, and should be appointed by the committee of management as shareholders therein; and certain writings called scrip certificates were to be issued by the said committee, each of which was to purport that the holder thereof was entitled to so many shares of and in the capital of the said intended Company as should be therein mentioned, and to become shareholders thereof in respect of the same; and before the making of the promise hereinafter mentioned all the said shares had been allotted to divers persons, and such scrip certificates were about to be issued. And thereupon, in consideration that the plaintiff, at the request of the defendants, then employed the defendants to purchase for him, the plaintiff, divers, to wit, fifty of the said shares in the said intended Company, at a reasonable price in that behalf, and to procure for him such scrip certificates for the said shares as aforesaid, when the same should be issued by the said Company, at and for commission and reward to the defendants in that behalf; the defendants then promised the plaintiff to purchase the said shares for him, the plaintiff, and to procure and deliver to him such scrip certificates for the same as aforesaid, *within a reasonable time in that behalf*(a). And the plaintiff says, that he has always performed the said agreement in every thing on his part to be performed; and that, after the making thereof, and before the issuing of the said scrip certificates, the defendants bought for the plaintiff the said fifty of the said shares, at and for such price as aforesaid, to wit, 2*l.* 6*s.* 9*d.* per share; and that afterwards, to wit, on the 14th of October, in the year aforesaid, scrip certificates for divers, to wit, all of the shares in the said intended Company, were issued by the said persons as aforesaid; and that, within a reasonable time in that behalf, to wit, on the day and year last aforesaid, the plaintiff paid to the defendants the said purchase-money, together with their

(a) These words were, by order of the judge, substituted for "when the same should be issued as aforesaid, on being paid the purchase-money thereof and such commission as aforesaid."

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said commission, amounting, to wit, to 121*l.* 17*s.* 6*d.*, and then requested the defendants to procure for and deliver to him such scrip certificates as aforesaid, in pursuance of their said promise. And the defendants then could and might have so procured and delivered the said scrip certificates, and a reasonable time so to do had elapsed before the commencement of this suit; yet the defendants have not procured and delivered the said scrip certificates to the plaintiff, but have wholly neglected and refused so to do; by reason whereof the plaintiff has wholly lost the benefit of the said purchase and of the said scrip certificates, and of divers great gains and profits which he would have made by the same; and, by reason of a fall in the value of the said shares, the plaintiff has been greatly damnified by being unable to dispose of the same.

The second count was for money lent, money had and received, and for money due upon an account stated.

Pleas—first, non-assumpsit; secondly, to the first count, that a reasonable time for the defendant to procure and deliver the said scrip had not elapsed before the commencement of the suit: upon which issues were joined (*a*).

The cause was tried at the Liverpool Spring Assizes, 1846, before *Coleridge*, J., when it appeared that the plaintiff, on the 30th of September, 1845, employed the defendants, stockbrokers at Manchester, to purchase for him fifty shares in the Essex and Suffolk Railway Company. They thereupon went into the market, and in their own names, and without disclosing the name of the plaintiff, contracted with one J. H., a sharebroker at Manchester, for the shares. The defendants thereupon forwarded to the plaintiff the following bought note:—

"5, Town Hall Buildings, Manchester,
September 30, 1845.

"To J. FLETCHER, ESQ.

"WE have this day bought, on your account, fifty

(*a*) There was another plea, which had been demurred to.

shares in the Essex and Suffolk Railway, at 2*l.* 7*s.* 6*d.* per share.—Yours, &c.,

"W. & E. MARSHALL.

"£118 15 0 paid.
3 2 0 premium and commission.

£121 17 6 net."

The following account was also given in evidence:—

"J. FLETCHER, ESQ., in account with W. & E. MARSHALL.

	£	*s.*	*d.*
"Dr.			
"Sept. 30. To fifty Essex and Suffolk -	121	17	6
"Oct. 6. To twenty Chester and Manchester Direct - - -	71	5	0
	£193	2	6
"Cr.			
"Sept. 30. By cash - - - -	30	0	0
"Oct. 4. Ditto - - - - -	20	0	0
"Balance - - -	143	2	6
	£193	2	6
"Dr. to Balance - - -	143	2	6

"Settled, Oct. 14, 1845. E. MARSHALL."

It was proved that the custom of the Manchester Stock Exchange was, that there were two days in each month (settling days) on which accounts between brokers, and between them and their principals, were settled; and, according to that custom, the next settling day after the 30th of September would be the 14th of October. The plaintiff, on the 24th of October, went to the defendants for his shares, and, being informed by one of them that they had purchased the shares, he demanded them or his money: he replied, that they had purchased the scrip on the 30th of

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September, of Mr. J. H, but that it had not been delivered to them, as they could not always be procured when required. He stated that they had not paid the money over to Mr. H.

It further appeared that scrip had been issued by the Company before the 14th of October, though none had reached Manchester before that day, and that none had been received by Mr. J. H. before the 11th of Novem ber, on which day he delivered it to the defendants. The action was commenced on the 31st of October.

The plaintiff's case being closed, the defendants' counsel submitted, that the first count had not been proved; that the implied contract was, that the defendants would use due diligence to procure and deliver the scrip, and not to procure and deliver them at all events, as alleged in the first count. He also contended, that the plaintiff could not recover under the common count. The learned Judge, however, at the request of the plaintiff's counsel, allowed the amendment hereinbefore stated in the first count to be made, giving the defendants leave to move to enter a non-suit. It was then proved on behalf of the defendants, that they had used great exertion to procure the scrip for the plaintiff, but that it was then difficult to get particular kinds of shares or scrip. It was also proved, that in many cases brokers did not enforce the delivery of shares on the regular settling day, but frequently, for convenience sake, allowed transactions to go over.

His Lordship expressed his opinion, that, the contract being to deliver scrip within a reasonable time, the plaintiff had a right to rescind it if not completed within that time, and to recover his purchase-money back under the count for money had and received. He also told the jury, that, if they thought the first count to be proved, they would consider whether the breach was proved, namely, that the defendants had not performed that contract within a reasonable time before the commencement of the action; and in

determining this they would be guided by the general rule applicable to dealings of this nature, and not by what took place in particular transactions; and that, if they thought fourteen days had, by usage, been fixed as a reasonable time, the plaintiff was entitled to a verdict, A verdict was found for the plaintiff for 121*l.* 17*s.* 6*d.*

Watson having obtained a rule nisi for a nonsuit or new trial—

Martin and *Cowling* shewed cause (*a*).—The defendants were bound to deliver the shares either on the 14th or within a reasonable time; and not having done so, the plaintiff had a right to rescind the contract, and recover back his money under the count for money had and received. The inability of H. to procure the shares for the defendants does not affect the case, as their engagement was absolute. As to the first count, there was some evidence to support it. The defendants had contracted themselves to procure the shares, and are estopped from disputing that they had bought them by the delivery of their account, which admits that they had bought them. [*Parke*, B.—But even in that case the first count would be wrong, for it describes the contract as one to procure scrip at all events, whether they obtain it or not. But that is not so: the duty of the broker is only to use due and reasonable diligence in endeavouring to procure the scrip. You must confine your claim to the second count.]

Atherton, (with him was *Watson*), in support of the rule.—The Court having disposed of the first count, the question turns on the second; and it is clear the verdict on that count cannot be sustained. What is reasonable time, depends upon the circumstances of each particular case; and

(*a*) Before *Parke*, B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

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the Judge was wrong in directing the jury that the settling days were the periods to look to; and, indeed, there was evidence that the brokers did not consider themselves bound to deliver on those days. In some cases it would be impossible to deliver on those days, and then the reasonableness of the time would depend on the particular circumstances.

PARKE, B.—I think that there is no doubt as to the plaintiff's right to recover on the count for money had and received. He employed the defendants to make a bargain for shares, to be delivered to him within a reasonable time; and the meaning of that expression, by the usage of brokers at Manchester, is explained to be, at or before the next settling day, although they occasionally are in the habit of extending that time, as an indulgence to each other. In this case the contract was made on the 30th of September; and, according to this usage, the scrip was deliverable on the 14th of October. On the 24th of that month the plaintiff inquires of the defendants if they have got the scrip: they reply that they have not; on which he ascertains that they have still got his money, and countermands the application of it, as he unquestionably had a right to do. If the contract which the defendants had made with H. was on the terms that the scrip was to be delivered on the 14th, then a delivery on that day was an essential part of the contract: and, on its being broken by H., the defendants were bound to repay the plaintiff his money, and not to pay it over; and if the contract was not made on that condition, they had no right to pay the money over at all. In either view, therefore, the plaintiff was entitled to receive back his money. If any reason could be assigned why the jury should have come to a different conclusion as to what was reasonable time under this count, from that which they came to on the special count, it would be a ground for a new trial; but it is clear that they have proceeded on the ground that the 14th of October was the reasonable time

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for the delivery of scrip in both cases. With respect to the first count, I own I think it is not sustained by the evidence, and that the defendants would be entitled to a new trial for misdirection on that count; but, in conformity with the course taken by us in the case of *Hughes* v. *Hughes* (*a*) yesterday, if the plaintiff will consent that a verdict be entered for the defendants on the general issue to the first count, the present rule may be discharged.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule discharged.

(*a*) 15 M. & W. 701.

COURT OF COMMON PLEAS.

Michaelmas Term, 1848.

1848.

PEART *v.* THE UNIVERSAL SALVAGE COMPANY.

Nov. 4th.

The 68th section of the 7 & 8 Vict. c. 110, empowers the Court or a Judge to give leave to a judgment creditor of a joint-stock company to issue execution against any shareholder without any suggestion or *scire facias*.

IN this case judgment had been recovered against the Company, being a joint-stock company, registered under the 7 & 8 Vict. c. 110, by the plaintiff, a creditor; and by an order of *Williams*, J., dated the 2nd of November, 1848, execution was directed to issue against Lund, a shareholder of the Company, pursuant to the provisions of the 68th section of the 7 & 8 Vict. c. 110, the Registration Act. This was an application to rescind that order, on the ground that the statute did not warrant the order.

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Willes now moved (*a*) for the rule.—The 68th section applies only to cases within the 67th section, that is, to actions at the suit of shareholders, and not to those at the suit of creditors. The 25th section enacts, "that every shareholder shall continue liable in respect of any judgment, &c. against the company, as he would have been if the said company had not been incorporated." The 66th, 67th, and 68th sections provide for the mode of issuing execution; and the point now raised depends upon the construction of the words of the 68th section—"such execution may issue by leave of the Court, or of a Judge of the court in which such judgment, &c. shall have been obtained, &c., without any suggestion or *scire facias* in that behalf:" the words "such execution" refer to cases in the 66th or 67th sections; and it is submitted that they must refer to the cases provided for by sect. 67; for the former part of sect. 68 declares, "that in the cases provided by this act for execution on any judgment, decree, or order, in any action or suit against the company, to be issued against the person or against the property and effects of any shareholder or former shareholder of such company, or against the property and effects of the company, *at the suit of any shareholder or former shareholder*, in satisfaction of any monies, &c. paid or incurred by him in any action or suit against the company, such execution may be issued by leave of the Court, &c., without any suggestion or *scire facias*;" so that no effect can be given to these words, unless the right to sue out execution without a *scire facias* be limited to suits by one shareholder against the company, or against another shareholder to recover contribution.

Cur. adv. vult.

Nov. 9th. WILDE, C. J., now delivered the judgment of the Court.

(*a*) Before *Wilde*, C. J., *Coltman*, J., *Maule*, J., and *Williams*, J.

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—In this case an application was made to rescind an order made by my Brother *Williams*, under the supposed authority of the statute of the 7 & 8 Vict. c. 110, s. 68, upon the ground that such order was not warranted by the statute. It was contended that the section referred to applied only to judgments in actions at the suit of shareholders, whereas the present action was at the suit of a creditor. The validity of the objection urged against the order, depends upon the construction of the 68th section of the statute; and by that section it is enacted, that in cases provided for by the act, for executions against shareholders upon judgments obtained against the company, the Judge may give leave for such execution to issue, without the entry of a suggestion, or the issuing of a writ of *scire facias*. The only section which makes provision for such execution is the 66th section; and it is therefore necessary to have regard to the 66th in ascertaining what cases are comprised in the 68th. By the 66th section it is enacted, that every judgment, order, and decree obtained against joint-stock companies therein mentioned, shall take effect and be enforced, and execution thereon issued, not only against the effects of the company, but, on failure to obtain satisfaction by those means, also against the persons and effects of shareholders therein particularly described, and against any former shareholders who were shareholders when the contract or agreement on which the judgment, &c. may have been obtained, was entered into, or who became shareholders during the time such contract or engagement was unexecuted or unsatisfied. This section, which is the only one which contains any provision for issuing execution against shareholders, plainly refers to executions on judgments in actions at the suit of creditors, and has no relation to actions between the shareholders themselves, or by the shareholders against the company. The only section that refers to actions at the suit of shareholders, is the 67th section, which enables the shareholder to maintain an action against the company,

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and to recover contribution for what he may have been compelled to pay by means of an execution issued against him under the authority of the 66th section. The clause then reserves the right of recovering contribution by the ordinary remedy, upon failure to obtain satisfaction under the judgment against the company. That clause neither directly nor impliedly gives or recognises any right or power by one shareholder to maintain an action or to issue execution against another shareholder, and therefore can present no case falling within the 68th section, that section applying only to cases in which the statute had made provision for execution against shareholders. The section in question, the 68th, enacts, that in the cases provided by the act, for execution on any judgment, decree, or order, in any action or suit against the company, issued against the person or effects of any shareholder of the company, or against the effects of the company, at the suit of a shareholder, in satisfaction of what he may have been compelled to pay in any action or suit against the company, such execution may be issued by leave of the Court, without previous suggestion or *scire facias*, on motion or summons. It is insisted, that, upon the true construction of this section, the words " at the suit of any shareholder" over-ride and control the whole clause, and, therefore, that the power given to the Judge to dispense with the suggestion or *scire facias*, is limited to executions at the suit of shareholders; but this construction, if adopted, would render the clause inoperative, because the section gives authority to dispense with the suggestion and *scire facias* in cases of execution provided by the act to issue against shareholders; and the only section providing such execution is the 66th, and that plainly refers to execution on judgments at the suits of creditors; and no provision whatever is contained in the act for execution at the suit of shareholders. If, therefore, the words, " at the suit of shareholders," as is contended, control the whole clause, it can have no operation whatever in

regard to executions against shareholders. Suppose the 68th section related to the 67th section only, by which an action is given against the company to recover the reimbursement of that which the shareholder may have been compelled to pay by means of an execution under the former section, the provision dispensing with the suggestion or *scire facias*, in such a case, could have no operation, because, on judgment recovered by a shareholder against the company, neither suggestion nor *scire facias* would be necessary previous to issuing execution; and thus the clause, according to the construction contended for, would have no application to executions against shareholders, and would be useless and nugatory as regards such executions at the suit of shareholders, and therefore entirely inoperative. There is no ground for the construction contended for, and the intention of the Legislature is sufficiently clear. The whole argument arises from the 68th section having extended dispensation of suggestion and *scire facias* to a case not requiring it, namely, the case of an execution on a judgment at the suit of shareholders against the company. The result therefore is, that there is no ground for the application.

Rule refused.

1848.

COURT OF QUEEN'S BENCH.

Hilary Term, 1848.

Feb. 8*th*.

POLLOCK *v.* STABLES.

The plaintiff, a sharebroker at Leeds, bought for the defendant ten railway shares, to be paid for on delivery. The defendant not being ready to pay when the scrip was delivered to the plaintiff, the vendors demanded of the plaintiff the money or the scrip. He redelivered the scrip, which had fallen in price, to the vendors, who sold them for the then market price, and, according to the custom of the Leeds Stock Exchange, called upon the plaintiff to pay the difference, which he, without communicating with the defendant, did, by allowing the same in account:—*Held*, that the plaintiff might recover that difference from the defendant in an action for money paid.

Semble, that a party who employs a broker at a particular place to purchase shares, is bound by a usage affecting the broker at that particular place.

ASSUMPSIT.—The first count was for money paid; and the second for commission due to the plaintiff as a sharebroker, on shares purchased.

Plea, non assumpsit.

The case was tried at the York Spring Assizes, 1847, before *Alderson*, B., when it appeared that the defendant, on the 1st of September, 1845, directed the defendant, a stockbroker at Leeds, to buy for him ten Huddersfield and Manchester Railway shares. The plaintiff accordingly, on the same day, bought of Messrs. Turley & Cooper, at Leeds, in his own name, ten shares in the above railway, at £28 per share, and forwarded to the defendant the following bought note:—"3rd September: Bought for Mr. Stables, ten shares in the Huddersfield and Manchester Railway, at £28 per share; commission, 5*s*. per share; payable on delivery." The shares were delivered to the plaintiff before the following account day. The defendant having declined to pay the contract price, on account of his inability, and the broker of Messrs. Turley & Cooper being informed thereof, on the 10th of September demanded back the shares or the purchase-money. The plaintiff, who had retained the shares in his possession, accordingly, without notice to

the defendant, re-delivered them to him, and they were re-sold for 19*l.* 10*s.* per share. By the rules of the Leeds Stock Exchange, of which the plaintiff's and the vendors' broker were members, if shares purchased are not taken up by the buyer within four days after they are deliverable, the holder is at liberty, after notice, to sell out against the buyer and to claim the difference from him. The plaintiff was accordingly required by the broker of Messrs. Turley & Cooper to pay the difference between the contract price and that at which they were resold, which he, without consulting the defendant, did, by crediting him with that amount. The action was to recover the sum of £85, being that difference, and 2*l.* 10*s.* for the plaintiff's commission on the purchase. It was objected at the trial, that, as to the £85, the defendant never having given any authority to the plaintiff to pay that sum, he was not liable; and secondly, that, if he had, it could not be recovered under the count for money paid. The jury, under his Lordship's direction, found a verdict for the plaintiff for the amount of the commission, 2*l.* 10*s.*, and for the defendant on the other count, leave being reserved to the plaintiff to move to enter the verdict for the plaintiff on that count for £85.

Baines having obtained a rule accordingly,

Watson and *Pashley* now (*a*) shewed cause.—No implied promise can be raised by the payment of money, where the party has had no opportunity of prohibiting the payment. [Lord *Denman*, C. J.—Was it the plaintiff's fault that he had no such opportunity? *Patteson*, J.—The defendant committed the first default by not furnishing money to the plaintiff to take up the shares, and the loss had resulted from that default. *Coleridge*, J.—Suppose the vendor had given

(*a*) Before Lord *Denman*, C. J., *Patteson*, J., *Coleridge*, J., and *Wightman*, J.

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notice to the purchaser's broker, and the broker neglected to take up the shares, could the vendor sell against the wish of the purchaser?] It is submitted that he could not; at all events, the defendant ought to have had the same option that the plaintiff had of taking up the shares. If this had been allowed him, he might have paid the price and taken up the shares. But here no liability was cast on the plaintiff, as the contract was in the name of the defendant: *Trueman* v. *Loder* (*a*). [*Patteson*, J.—You cannot infer from the bought note that the defendant's name was communicated to the vendor.] In *Bayliffe* v. *Butterworth* (*b*) it was assumed that the contract would be made at the Liverpool Exchange, where the custom existed; but here the authority was a general one, and would have been well executed if the purchase had been made elsewhere; besides, here there was no proof of knowledge of the custom by the plaintiff. [*Coleridge*, J.—The plaintiff was bound by the general usage amongst brokers; and does it not follow as a consequence, that the party who employed him was bound by the custom of the market to which he went? Suppose the authority to be general, as contended, can it make any difference, if that authority warranted a purchase at Leeds?] It is submitted that it can: *Scott* v. *Irvine* (*c*), which was not cited in *Bayliffe* v. *Butterworth* (*d*), has decided that a principal is not bound by a custom of which he is not cognizant. Lastly, the plaintiff cannot recover under the count for money paid, as no money passed between the parties: *Moore* v. *Pyrke* (*e*), *Bowlby* v. *Bell* (*f*), *Davies* v. *Humphreys* (*g*), *Hannuic* v. *Goldner* (*h*).

Baines and *T. F. Ellis*, contrà, in support of the rule.—Notice to the broker, the plaintiff, was notice to the defendant; *Sutton* v. *Tatham* (*i*); which is in this case the only

(*a*) 11 A. & E. 589.
(*b*) Ante, p. 283; *S. C.*, 1 Ex. Rep. 425.
(*c*) 1 B. & Ad. 605.
(*d*) Ante, p. 283; *S. C.* 1 Exch. Rep. 425.
(*e*) 11 East, 52.
(*f*) Ante, Vol. 4, p. 692; *S. C.*, 3 C. B. 284.
(*g*) 6 M. & W. 153.
(*h*) 11 M. & W. 849.
(*i*) 10 A. & E. 27.

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notice necessary to lay the foundation of the action: 1 Selw. N. P. 76, 8th edit. [*Wightman*, J.—The defendant says, "I should never have been liable if you had given me notice of your intention to sell, as I would have paid the difference and taken up the shares."] But he ought to have provided funds to his broker on the day agreed: he knew that he had broken his contract, and was not entitled to any notice. The defendant authorised the plaintiff to go into the market and purchase in his own name; and if, by reason thereof, a damage has resulted to the plaintiff, he having done what he was bound to do as between broker and broker, the defendant is liable; and it makes no difference that the defendant was not cognisant of the custom: *Bayliffe* v. *Butterworth*. If the plaintiff had not handed over the shares, he might have recovered the price; and his having done so cannot put him in a worse position. [*Wightman*, J.—But your cause of action would not have arisen until you had paid over the money; so that argument does not apply. *Coleridge*, J.—I do not see how you are entitled to commission, if the contract earning it turns out useless.] The contract becomes useless by the defendant's fault. The commission was earned by the purchase, and the contract became useless by what subsequently occurred.

Lord DENMAN, C. J.—We will communicate with the judge before giving our judgment.

Cur. adv. vult.

July 12th.

Lord DENMAN, C. J., now delivered the judgment of the Court.—This was an action of assumpsit for money paid, and for commission. At the trial it appeared that the plaintiff, a sharebroker at Leeds, bought for the defendant, and by his directions, ten shares in the Huddersfield and Manchester Railway, at £28 a share, to be paid on delivery of scrip. The defendant not being ready to pay when the scrip was delivered to the plaintiff, the vendors demanded the money or the scrip of the plaintiff, who delivered the

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scrip back, which had fallen in price; and, according to the custom of the Stock Exchange at Leeds, the vendors sold the shares for the then market price, and called upon the plaintiff to pay the difference, which he did, according to the usage. The present action was brought to recover the money so paid, amounting to £85, and also commission upon the original purchase. The jury found a verdict for the plaintiff for 2*l.* 10*s.* in respect of the commission; but, under the direction of the learned judge, who was disposed to think that an action for money paid was not maintainable, found a verdict for the defendant upon the count for money paid, with liberty for the plaintiff to move to enter a verdict upon that count for £85 damages, in case the Court should be of opinion that the plaintiff was entitled to recover the amount paid by him for the loss upon the transaction, and that it was recoverable under the count for money paid.

The case of *Bayliffe* v. *Butterworth* (*a*) is not, we think, distinguishable in principle from the present. It was there held by the Court of Exchequer, under circumstances very similar to those in the present case, that an action for money paid was maintainable by a sharebroker against his principal, where the former was, by the custom of the share-market in which he dealt, obliged to make good deficiencies occasioned by the default of his principal; and that the latter must be considered as dealing with his broker according to the usage of the market in which he deals; and that a contract according to such usage was equivalent to a request to a broker to pay the deficiency if the principal failed to do so himself. That decision is in accordance, as far as the circumstances are parallel, with the case of *Sutton* v. *Tatham* (*b*). We are, therefore, of opinion, that the rule should be made absolute, to enter a verdict for the plaintiff on the count for money paid, for £85.

Rule absolute.

(*a*) Ante, p. 283; *S. C.*, 1 Exch. Rep. 425.
(*b*) 10 A. & E. 27.

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COURT OF COMMON PLEAS.

Trinity Term, 1848.

EDWARDS and Others *v.* LAWLESS.

June 26th.

An attorney's bill, addressed to the provisional committee of the Great Manchester, &c. Railway Company, of whom the defendant was one, was delivered to another member of the same committee, at his place of business:—*Held*, that this was not a delivery to the defendant, pursuant to the 6 & 7 Vict. c. 73, s. 37, and that the bill should have been delivered either at the place of business of the Company, or to some person who might reasonably be considered to represent the provisional committee.

DEBT for work done as attornies in conducting certain railway business, for money paid, and on an account stated.

Pleas—first, nunquam indebitatus; second, payment; third, except as to the account stated, that the plaintiffs did not, one calendar month before the commencement of the suit, deliver unto the defendant a signed bill of their fees and charges, in compliance with 6 & 7 Vict. c. 73, s. 37.

Replication—To first plea, joinder in issue; to second, denial of payment; to third, that the plaintiffs did, one calendar month before action, deliver unto the defendant a signed bill, in compliance with the said statute. Issue thereon.

The cause was tried before *Rolfe*, B., at the Leicester Summer Assizes, 1847, when it appeared that the action was brought against the defendant as a member of the managing committee of "The Great Manchester, Rugby, and Southampton Railway Company, with a direct line from Derby to Rugby;" that on the 26th of May, 1846, the signed bill was delivered to one Moore, also a member of the managing committee, at his place of business, in Wood-street, Cheapside, the office of the Railway Company being at No. 1, Royal Exchange-buildings. The bill was headed, "The Provisional Committee of the Great Manchester, Rugby, and Southampton Railway Company, with a direct line from Derby to Rugby, To Edwards, Mason, and

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Edwards." The bill contained charges for business done from September 1, 1845, to April 15, 1846. It appeared that the defendant had become a member of the committee after a portion of the business had been performed; and that on the 12th of November, 1845, he wrote a letter to the secretary, withdrawing altogether from the Company. The jury found a verdict for the plaintiffs, for 492*l.* 10*s.*, leave being reserved to the defendant to move to enter a nonsuit.

Whitehurst, Q. C., had obtained a rule nisi accordingly, on three grounds; but as the judgment of the Court was confined entirely to one, namely, that there was no delivery of a signed bill to the defendant, the arguments on the other points are omitted.

Humphrey, Q. C., and *Phipson* now (*a*) shewed cause.—The defendant is a joint-contractor with Moore, and the delivery of a bill of costs to one joint-contractor is a good delivery to charge all the joint-contractors, within the 6 & 7 Vict. c. 37. The evidence proved the delivery of a bill, charging the provisional committee, to one of the members, (Moore), at his place of business: *Crowder* v. *Shee* (*b*), *Vincent* v. *Slaymaker* (*c*), *Finchett* v. *How* (*d*); and in *Taylor* v. *Hodgson* (*e*) a letter accompanying a bill was referred to, to shew who was the party chargeable therewith. [*Cresswell*, J.—But the managing, and not the provisional committee, are the contracting parties.] The prospectus produced shewed that the defendant was a provisional as well as a managing committee-man, and all the members of the managing are comprised in the provisional committee. But, if he were not, the heading of the bill would not vitiate the

(*a*) Before *Wilde*, C. J., *Coltman*, J., *Cresswell*, J., and *Williams*, J.

(*b*) 1 Camp. 437.

(*c*) 12 East, 372.

(*d*) 2 Camp. 277.

(*e*) 3 Dowl. & L. P. C. 115; 14 L. J., Q. B., 316.

delivery, for a delivery of a bill without any heading at all would be sufficient within the statute: *Manning* v. *Glynn*(*a*). [*Wilde*, C. J.—The bill contains items for business done before the defendant joined the committee.] That will not vitiate the bill, for those items may be struck off on taxation.

Whitehurst, Q. C., with whom was *Keane*, contrà.—Members of a joint-stock company like this do not stand in the relation of partners, and one member is not the implied agent of another. The object of the statute, in requiring the delivery of the bill, was to prevent fraud and collusion; but if the delivery in this case be held sufficient, that object will be defeated, for an attorney, by colluding with one member of a committee, might deliver a bill to him which he might conceal from the other members, and then the attorney proceed against one of those other members who had never seen the bill. The bill must be addressed *nominatim*, and delivered to the party to be charged therewith, in order that he may have an opportunity of taxing it. Upon this point the case of *Manning* v. *Glynn* is expressly in the defendant's favour; for there *Joy*, C. B., says, that "the statute (which is the same as the English statute) requires the bill of costs to be served on the party to be charged therewith; and that if it be not headed with the name of the person to be charged, the person served cannot tell whether he has anything to do with it more than any other member of the community;" and that case is confirmed by the case of *Taylor* v. *Hodgson*, also cited for the plaintiffs, because there the plaintiff was obliged to resort to a letter addressed to the defendant, and accompanying the bill of costs, in order to shew that the defendant was the party chargeable therewith. [He was then stopped by the Court.]

(*a*) 1 Jones' Irish Exch. Rep. 513.

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WILDE, C. J.—We are all agreed upon the point as to the delivery of the bill, and we are of opinion that there has been no sufficient delivery, pursuant to the statute 6 & 7 Vict. c. 73, s. 37. This case is not to be looked on as an ordinary one of co-contractors; but regard must be had to the particular nature of the concern in which the defendant was engaged. Different parties came into it at different times. Moore came in prior to the defendant, who joined in October, 1845; and there are many items in the bill for work done as well before as after the defendant was a member of the committee. It must be borne in mind that this bill was not delivered to the provisional committee at their known place of business, but to Moore, at his place of business. Now what was the relation of Moore to the defendant? Can it be said that the former stood in any such relation to the defendant as to make the delivery of the bill to him, at his private place of business, a delivery to the defendant? Or can it be considered that such a delivery was a delivery to the provisional committee? Without expressing an opinion as to how far in general a delivery to one of several is equivalent to a delivery to all the co-contractors, but, looking at the defendant as a member of the managing committee, the Court are of opinion that the relative position of its members is of such a particular nature, that this delivery to Moore cannot bind such of them as might be liable for a portion of the bill. This bill ought to have been delivered either at the place of business of the Company, or to some person who can reasonably be considered to represent the provisional committee; and, as Moore is not such a person, the rule for a nonsuit must be made absolute.

COLTMAN, J.—I am of the same opinion. There is a distinction between the case of shareholders in joint-stock companies and ordinary partners; and the same rules that would apply to partnerships would not be applicable to persons in this relation. The connexion between share-

holders in joint-stock companies is *sui generis*, and not the ordinary connexion of co-contractors and partners. I therefore think, that the delivery of the bill of costs to Moore was not a delivery to the defendant.

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WILLIAMS, J., concurred (*a*).

Rule absolute.

(*a*) *Cresswell*, J., had left the court at the close of the argument.

COURT OF COMMON PLEAS.

Michaelmas Term, 1848.

BLANDY *v.* DE BURGH.

Nov. 25th.

An action was brought by an attorney against a provisional committee-man, for the amount of his bill of costs. The offices of the Company were in Moorgate-street, and upon the office-door was a plate, with their name on it. On the 5th of January, 1846, none of the deposits having been paid, the Company died a natural death, and it did not appear that the defendant was ever at the office after that date. On the 28th of September following, the plaintiff delivered his bill directed to the Company, at the offices. The plate was then on the door, and the bill was given to a person who appeared to be a clerk.

Held, by *Wilde*, C. J., and *Williams*, J., that this was not a delivery of the plaintiff's bill at the defendant's office of business, pursuant to the 7 & 8 Vict. c. 73, s. 37.

And by *Coltman*, J., and *Maule*, J., contrà, that it was.

THIS was an action of debt to recover the amount of an attorney's bill of costs. The defendant pleaded, secondly, that no signed bill of costs had been delivered by the plaintiff one month before action, pursuant to 6 & 7 Vict. c. 73, s. 37.

Replication, that the plaintiff did, one month before the commencement of the action, to wit, on &c., leave for the defendant, at his office of business, a bill of the said charges,

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fees, and disbursements, subscribed with the proper hand of the plaintiff, &c.

Upon the trial, before *Wilde*, C. J., at the sittings in London after Trinity Term, 1847, it appeared that the plaintiff sought to recover the amount for services done as country solicitor and local agent of "The Oxford, Thame, High Wycombe, and Uxbridge Junction Railway Company," formed in August, 1845, and provisionally registered, under 7 & 8 Vict. c. 110, on the 15th of November, 1845. The defendant was a member of the provisional, and from the 15th October, 1845, chairman of the managing, committee of the Company. On the 20th October the offices of the Company were at No. 43, Moorgate-street, in the city of London, and this was duly registered as the Company's place of business, under the 7 & 8 Vict. c. 110, s. 4, and Schedule (C.). No change of the place of business was ever returned or registered. During the month of December the defendant was present at meetings of the Company, held at the offices in Moorgate-street, but was not shewn to have had anything to do with the Company since the 5th January, 1846. That day was appointed for the payment of deposits; but, as none were paid, the scheme was abandoned, or, as stated by a witness at the trial, "the Company died a natural death."

A letter from the secretary of the Company to the plaintiff, headed "Oxford, Thame, High Wycombe, and Uxbridge Junction Railway Offices, 43, Moorgate-street," and dated March 9, 1846, was read in evidence. From this it appeared that a special meeting of the Company had been held on the 5th of March, and a sub-committee appointed, for the purpose of considering the claims of the creditors of the Company, and that the sub-committee had instructed the secretary to offer the plaintiff 100 guineas in respect of his claims on the Company. On the 28th of September, 1846, the plaintiff's bill of costs was inclosed in an envelope, which, as was also the bill, was directed "To the Provisional Committee of the Oxford, Thame, High Wycombe, and

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Uxbridge Junction Railway," and delivered at the offices, No. 43, Moorgate-street, to a person who had the appearance of a clerk. There was then a brass plate, with the name of the Company engraven on it, upon the door of the office.

For the defendant it was contended, that there was no evidence to go to the jury that the bill of costs had been delivered for the defendant at his office of business, under the 6 & 7 Vict. c. 73, s. 37. The Lord Chief Justice, however, allowed the case to go to the jury, and a verdict was found for the plaintiff, leave being reserved to move to enter a verdict for the defendant, or for a nonsuit, if the Court should be of opinion there had been no sufficient delivery of the bill.

A rule nisi, accordingly, having been obtained in Michaelmas Term, 1847, by *Montague Chambers*, Q. C.,

Byles, Serjt., and *Phipson* now shewed cause.—A delivery of the bill to the Company would be a good delivery to the defendant, the chairman. The evidence shewed a good delivery to the Company. The Company were still in existence; for, although the project was abandoned, there had been no dissolution of the Company. None of the provisions of the acts of 7 & 8 Vict. c. 111, and 9 & 10 Vict. c. 128, had been complied with, and no change of the place of business had been registered, as required by the 7 & 8 Vict. c. 110, s. 4, and schedule. According to the ordinary rule of law, therefore, the place of residence being once shewn, it must be presumed to continue until the contrary be shewn: Best on Presumptions, 186; Taylor on Evidence, 124; *Clarke* v. *Alexander* (*a*). In *Edwards* v. *Lawless* (*b*) it was held, that a delivery of an attorney's bill at the place of business of one provisional committeeman, did not bind another; but *Wilde*, C. J., says, "The

(*a*) 8 Scott N. R. 147. (*b*) Ante, p. 357.

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bill ought to have been delivered either at the place of business of the Company, or to some person who can reasonably be considered to represent the provisional committee." The brass plate was allowed to remain on the door in Moorgate-street; therefore, independent of the Registration Act, the conduct of the Company would make this their place of business at common law. The bill was made out with a view to charge all the members of the provisional committee, and the plaintiff delivered it at the office in order that he might, at the end of the month, proceed against any individual members whom he might choose to select. [The *dictum* of the Chief Justice, in *Pilbrow* v. *Pilbrow's Atmospheric Railway Company* (*a*), as to what would have been good service, was also referred to.]

Montague Chambers, Q. C., and *Maynard*, in support of the rule.—The question is, was the delivery of the bill at the office in Moorgate-street a good delivery at the place of business of the defendant, and for him? The defendant is sued in his individual character; the bill should, therefore, have been left at his usual place of abode. If this was a good delivery for the defendant, then his private attorney might have delivered his bill there. *Edwards* v. *Lawles* shews that, with regard to the delivery of attornies' bills to provisional committee-men, a distinction is to be made between them and ordinary partnerships, and that a delivery to one is not a delivery to all. The delivery of this bill, therefore, at the place of business of the Company, is not a delivery to the defendant in his individual character. Then, as to the direction of the bill, the statute requires it to be left *for* the person to be charged therewith. If, therefore, the office in Moorgate-street can be taken as the place of business of the defendant, the bill being neither directed nor delivered *for* the defendant, but *for* the Company generally,

(*a*) Ante, Vol. 5, p. 4, 683.

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does not comply with the statute. The circumstances in this case render it improbable that the bill ever came to the defendant's hands. There was no evidence that the office in Moorgate-street continued to be that of the Company, or that the clerk was in the employment of the Company, or that the bill ever came into the possession of the defendant. In *Egginton* v. *Cumberledge* (*a*), the delivery of a bill of costs of a local agent to the attorney of the Company was held sufficient to charge a member of the provisional committee; but it was proved that the attorney had laid it before the committee, at a meeting at which the defendant was present.

WILDE, C. J.—I am of opinion that the rule for a nonsuit ought to be made absolute. The question for our decision is of much more importance, than the amount claimed in the particular case: for it is of great importance to determine what shall be deemed the place of business of an individual who has formed one of a company of this sort, especially as, in the case of attornies' bills, the rights of parties are affected by the time at which the delivery of such bills has taken place. The question in this case is, whether the plaintiff's bill was left for the defendant at his "office of business," within the meaning of the statute of the 6 & 7 Vict. c. 73. That statute has gone a great way to relieve professional men from several difficulties to which they were previously subjected in the delivery of their bills of costs, by giving them the choice, amongst other places for that purpose, of the office of business, or last known place of abode, of the party sought to be charged. In this case the defendant is sought to be charged by reason of his having been chairman of the managing committee; but I do not understand that the being a member of such a committee makes a person liable: he must have either expressly or impliedly given authority

(*a*) Ante, Vol. 5, p. 113.

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for the execution of the particular contract upon which the party is suing. The defendant is charged, not in respect of his interest or shares in the Company, but as having attended meetings of the committee, which were held for the purpose of preparing the Company to go to Parliament; and the plaintiff's bill was contracted in respect of business authorised at such meetings. The jury found, by their verdict, that the defendant was one of the parties who had given authority for the contract. What evidence was there, then, to shew that the house in Moorgate-street was the defendant's office of business? It is said, the transacting of business there with other members of the provisional committee. But it appears, that after the 5th of January, 1846, when the deposits were to have been paid, there were no funds, and nothing was done, and the Company, as was aptly said by one of the witnesses, died a natural death. After this period, what bond of union existed among the members of the committee? I think none. Any gentleman was entitled to withdraw; and there was no evidence that the defendant ever acted afterwards, or ever was at the place in question. It appears, not that the old committee went on to wind up the affairs of the Company, but, according to the letter which was read, that a sub-committee had been appointed for that purpose, so that the old provisional committee was at an end. The question then is, whether, the affair having been abandoned, and the defendant appearing no more in the matter after January, 1846, the office in Moorgate-street continued to be the defendant's place of business? I should say, that, for any practicable purpose, it ceased to be his place of business when the business ceased. But it appears that, on the 9th of March, a person, not shewn to have been authorised by the defendant, writes a letter, headed with the name of the Company and the address of the office in Moorgate-street. How, then, can that bind the defendant? It appears that the brass plate, which was put upon the door in 1845, had not been taken off in September,

1846. Was it the defendant's duty to take it off? I think clearly that it was not. In the course of the argument the Registration Act has been referred to, and it has been urged that no change in the place of business has been registered. But, supposing the Company to be at an end altogether, it is not necessary to register the cessation from business. There was no holding out by the defendant of this as his place of business. It was at one time made the place of business of the defendant, because he was then associated with other persons, who transacted business there respecting this Company; but at the time of the delivery of the bill he had ceased to be associated with them, or to transact business there. On looking at the act under which this question has arisen, although it was intended in part to relieve attornies and solicitors in the delivery of their bills, it yet seems to me to have meant cautiously to provide, to the person sought to be charged, the most reasonable security, that the bill should come to his hands. For these reasons, I am of opinion there was not a sufficient delivery of the plaintiff's bill, and that the rule should be made absolute.

COLTMAN, J.—I regret I am not able to assent to the opinion of the Lord Chief Justice. The question is, whether the office in Moorgate-street was the office of business of the party sought to be charged by the bill? The parties sought to be charged were the provisional committee of the Oxford, Thame, High Wycombe, and Uxbridge Junction Railway Company, of which the defendant was one, and the bill was left at an office which, it is contended, was the office of business of the provisional committee. The defendant is not charged in his private capacity, but as a member of a provisional committee, of which all the members are sought to be charged. The committee was formed for the purpose of establishing a railway company. The scheme proved abortive in January, 1846, and there is no evidence of the defendant's having subsequently been at the place in

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question. Nevertheless, although the scheme proved abortive, the duties of the parties did not cease; and one of their duties was, to see that the debts which had been contracted were discharged. I therefore do not think that the business of the Company was concluded when the bill was delivered. Now, the Joint-stock Act (7 & 8 Vict. c. 110) directs that, among other things, the houses of business of such companies should be registered, and also that every change of such place should be registered. I therefore think that the place registered continued to be the office of business of the committee. On these grounds, I am of opinion that the bill was rightly delivered, and that it is not competent for the defendant to repudiate this as his office of business; consequently, that this rule should be discharged.

MAULE, J.—I also think that the rule should be discharged. Sharing in my Brother *Coltman*'s regret at differing from the Lord Chief Justice, I derive much consolation from agreeing with my learned Brother. The plaintiff's bill was headed and directed to the provisional committee of the Company, and left at the place where the provisional committee, of which the defendant was one, had carried on their business. It does not appear that they ever changed their place of business. On the contrary, the name of the Company appears on the door of the office, and so long as it remained there was a continuing declaration to the public that they carried on business there. As to saying that they abandoned the business when they found that they could not go on, I dare say that they were very willing, as many people are, to abandon their liabilities upon the scheme becoming a losing one; but they had a duty to perform, which consisted not only in pocketing the profits, but also in paying their liabilities; and as they could not abandon this, the most important part of their duty to the public, it was necessary they should have some place for carrying on their business of payment; and it is due to the Company to

presume, that, until their debts were paid, this was their office of business for that purpose. I think, therefore, there is very good ground for saying, that the office at which this bill was delivered was at that time the place of business of the provisional committee. The plaintiff was not bound to deliver his bill at the defendant's place of abode. Had he done so, he must at that time have elected which of the committee he intended to proceed against; but he was not bound so to elect. He had a right to charge all or any of the members of the provisional committee; and, for the purpose of serving all, he might well send the bill to what was known to be their place of business. If the defendant did not know that he was charged with this bill, that was entirely his own fault. He must have known, that, although the scheme had been abandoned, there were demands against the committee; and, if he wanted to know what they were, he ought to have gone to Moorgate-street to learn.

WILLIAMS, J.—Agreeing with the Lord Chief Justice, I think that this rule should be made absolute. I am of opinion that the delivery of the bill at the office in Moorgate-street was not a delivery at the defendant's office of business, within the meaning of the statute 6 & 7 Vict. c. 73. The "office of business" mentioned in the act means the place where the party actually carries on business, by himself or by an agent; but, in my opinion, the defendant cannot be considered to have been carrying on business at this place, when the bill was left there. It appears that the Company had then come to an end; and, although it is true the defendant's liabilities had not ceased, it does not appear that he had any concern in making this office a place of business for the purpose of winding up the affairs of the Company.

The rule, therefore, failed.

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COURT OF CHANCERY.

BEFORE THE VICE-CHANCELLOR OF ENGLAND.

March 3. *Ex parte* YEATES, *Re* THE LANCASTER AND CARLISLE RAILWAY COMPANY.

A piece of land, part of certain trust-estates, was taken by a Railway Company, and the purchase-money deposited in court. Other part of the same estates was subject to a mortgage. The tenant for life presented a petition, praying that the sum deposited might be applied in payment of the mortgage-debt, and that the residue might be invested:—*Held*, that the Railway Company were not, under the 161st section of their act, liable for the costs of the mortgage (*a*).

A PETITION was presented by the tenant for life of certain estates, situate in the county of Westmoreland, part

(*a*) This section was in the same words as the 80th section of the Lands Clauses Consolidation Act, 8 Vict. c. 18, which was as follows:—

"In all cases of monies deposited in the Bank under the provisions of this or the special act, or any act incorporated therewith, except where such monies shall have been so deposited by reason of the wilful refusal of any party entitled to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required, it shall be lawful for the Court of Chancery in England, or the Court of Equity in Ireland, to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking, (that is to say) the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such costs as are herein otherwise provided for, and the cost of the investment of such monies in Government or real securities, and of the re-investment thereof in the purchase of other lands, and also the costs of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such monies shall be invested, and for the payment out of court of the principal of such monies, or of the securities whereon the same shall be invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants."

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of which had been taken by the above-named Company for the purposes of their act, (7 Vict. c. xxxvii), under the clause enabling incapacitated persons to sell, and the purchase-money (£883) had been deposited in court. Other parts of the same trust-estates were subject to a mortgage for securing £470 to B. T. The petition prayed that the mortgage debt might be paid off out of the fund in court, and that the residue might be invested in the purchase of Bank Annuities, and that the costs of all parties of and incidental to that application might be paid by the Railway Company in the manner directed by the Company's Act.

The order was made by consent, but when drawn up, the Company objected that it was not in accordance with the prayer of the petition, inasmuch as it provided that the costs of the mortgagee, who had been served with and appeared upon the petition, were to be paid by the Company.

Mr. *Rolt*, for the petitioners, relied on the words of the Company's Act (*a*).

Mr. *Follett*, for the Railway Company, contended that there were no words in their act of Parliament which rendered them liable for the costs of the mortgagee. That the payment of the mortgage debt was an arrangement between the parties interested in the residue of the estate, and did not at all affect that part taken by the Company. That the payment of an existing mortgage could not be considered as an investment within the meaning of the act, nor did it come within the meaning of payment out of the "principal of the monies."

Mr. *Rolt*, in reply, contended that the costs of the mort-

(*a*) See preceding page, note.

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gagee must be considered to be the costs of the person attending to receive the "payment of the principal of the monies" out of court. It mattered not whether he was mortgagee or not, if he were the party entitled to receive it. That if the Court were against him on this ground, at all events the costs in question would come within the general terms, "including therein all reasonable charges and expenses incident thereto."

The VICE-CHANCELLOR.—The petitioner does not ask that the money might be paid to him, but he prays that it may be paid to the mortgagee, which makes it necessary that the mortgagee should be served; but, in order to give him his costs, I must see some clause in the act comprehending this case. It is a voluntary act on the part of the petitioner to ask that a portion of the money in court should be paid to a mortgagee. If, by his voluntary act, a petitioner were to ask that a sum of £30,000 should be paid to thirty individuals, it could hardly be contended that the Company would be bound to pay all their costs. As between the Company and the petitioner, there is nothing in the transaction which subjects the money to be received from the Company to the payment of the mortgage debt, or that gave the mortgagee a right to claim specifically any money the mortgagor might receive in consequence of the dealing with the land. You now ask that the mortgagee may come to this court and participate with you. I am of opinion that I cannot order the mortgagee's costs to be paid by the Company.

Mr. *Rolt* asked that the order might be drawn up as of that day.

Mr. *Follett* objected, on behalf of the Company.

The VICE-CHANCELLOR.—The question is, whether the

costs of to-day are to be added to the other costs. It appears to me that the order, as drawn up by the petitioner, was wrong. Let the order be drawn up as of the former day.

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BEFORE THE VICE-CHANCELLOR OF ENGLAND AND THE LORD CHANCELLOR.

BROCKLEBANK *v.* THE WHITEHAVEN JUNCTION RAILWAY COMPANY.

July 19th & August 3rd.

BY the 220th section of the Whitehaven Junction Railway Company's Act, (7 & 8 Vict. c. lxiv), which is similar to the 123rd section of the Lands Clauses Consolidation Act, it was enacted, "that the powers of the Company, for the compulsory purchase or taking of lands for the purposes of this act, shall not be exercised after the expiration of three years from the passing thereof" (*a*).

After fruitless negotiations by a Railway Company with a landowner for the purchase of his land, they summoned a jury to assess the value. The jury met, but, before they delivered their verdict, the time within which, under the 220th section of their act, the powers of the Company to take land compulsorily were to be exercised, expired:—*Held*, by the Vice-Chancellor, that, under the terms of the 220th section, the landowner was entitled to an injunction to restrain the Company from depositing the amount found by the verdict, and from issuing any precept to the sheriff to deliver possession.

Held, by the Lord Chancellor, on motion to dissolve the injunction, that the question, as to the expiration of the Company's powers, was a purely legal one; that, pending the decision by a court of law, the injunction granted by the Vice-Chancellor of England be continued, it appearing that the balance of injury, if the Company were permitted to proceed in the meanwhile, would be on the side of the landowner.

(*a*) The sections of the act relating to the taking of lands by the Company, which were read to the Court, were the following:—

Sect. 136. "That, subject to the provisions of this act, it shall be lawful for the Company to agree with the owners of the lands which they are hereby authorised to enter into and take for the purposes of the railway, for the absolute purchase of any such lands, or such parts thereof as they shall think proper," &c.

By sect. 152 it was enacted, "that, if the owner of any such lands, or of any interest therein, on tender of the purchase-money or compensation either agreed or awarded to be paid, refuse to ac-

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The plaintiff in this case was the owner of a ship-yard, a part of which, the above-named Railway Company, in consequence, as was alleged, of the increased traffic on their line, required for enlarging their station. On the 5th March, 1847, the Company offered to treat for the purchase of so much of the plaintiff's premises as they required, but their offer was declined. The Company then proceeded under their powers for taking land compulsorily, and on the 17th May gave notice for that purpose. On the 19th

cept the same, it shall be lawful for the Company to deposit the purchase-money, or the compensation payable in respect of such lands, in the Bank of England, in the name" &c.; "and thereupon all the interest in such lands, in respect whereof such purchase-money shall have been deposited, shall vest absolutely in the Company."

Sect. 160. "That when the Company shall require to purchase any of the lands which, by this act, they are authorised to purchase or take, they shall give notice thereof to all the parties interested in such lands, or enabled by this act to sell and convey or release the same," demanding particulars and offering to treat.

Sect. 161. "That if, for one month after the receipt of such notice, such party and the Company shall differ as to the amount of the compensation to be paid to such party for any such interest, the amount of such compensation shall be settled in the manner hereinafter provided for settling cases of disputed compensation."

Sect. 162. "That where, according to the provisions of this act, the Company are authorised to enter upon and take possession of any lands required for the purposes of the railway, if the owner or occupier of any such lands, or any other person, refuse to give up the possession thereof, or hinder the Company from entering upon or taking possession of the same, it shall be lawful for the Company to issue their precept, under their common seal, to the sheriff to deliver possession of the same to the person appointed in such precept to receive the same; and upon the receipt of such precept the sheriff shall deliver possession of any such lands accordingly; and the costs accruing by reason of the issuing and execution of such precept, to be settled by the sheriff, shall be paid by the persons refusing to give possession; and such costs, if not paid on demand, shall be levied by distress, and the sheriff shall issue his warrant accordingly."

Sect. 165. "That one month at the least before issuing their warrant for summoning a jury, the Company shall give notice in writing to the party, with whom such difference shall have arisen, of their intention to cause such jury to be summoned," &c.

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June a precept was issued to the sheriff to summon a jury to assess the value of the land. On Saturday, July 3rd, the jury met, and the plaintiffs attended and submitted their evidence. The proceedings not having terminated on that day, the sheriff adjourned the meeting until Monday, the 5th July, and on the 6th the jury delivered their verdict. The Company's act having received the royal assent on the 4th July, 1844, the three years expired two days before the finding of the jury.

The plaintiff then filed his bill, praying an injunction to restrain the Company from proceeding further to obtain possession of his land.

Mr. *Bethell* and Mr. *Wray* contended, that the Company could not proceed one day after the termination of the three years allowed by the act; that the provisions of the act must be read strictly against the party on whom they conferred the benefit.

Mr. *Stuart* and Mr. *Malins*, for the Company, contended, that the notice having been confessedly given, and the precept of the sheriff having issued before the cessation of the compulsory powers, time could not run against the Company; that the jury, when empanelled, were bound to deliver their verdict, and the sheriff had no power to stop the delivery of their judgment, unless by transgressing the act. That, when once judicial proceedings were commenced, there was no limitation of time, and it might as well be argued, that the Statute of Limitations would run after bill filed or action commenced. That if the vendor could have enforced the contract against the Company, the Company, on the ground of mutuality, had a right to complete it too. That as soon as notice was given the contract was complete: *Doe* v. *London and Croydon Canal Company* (*a*), *Tawney* v. *Lynn and Ely Railway Company* (*b*). That in a court of equity the contract for the purchase was sufficient, and all

(*a*) Ante, Vol. 1, p. 257. (*b*) Ante, Vol. 4, p. 615.

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the rest was considered as mere machinery for carrying it out. [They also cited *Stone* v. *The Commercial Railway Company* (*a*), *The River Dun Navigation* v. *The North Midland Railway Company* (*b*), *Rex* v. *The Hungerford Market Company* (*c*), and *Salmon* v. *Randall* (*d*).]

The VICE-CHANCELLOR, (without hearing the reply).—It appears to me to be one of the plainest cases I ever saw. The cases that have been alluded to, which relate to the effect of the notice when all is within time, and no question arises as to time, and which decide what is the effect of one party giving that notice to the other which the act of Parliament requires, appear to me to have no relation to the present case, because I am not in a situation to deal with any right that has arisen merely from the giving the notice—that is not this case; whatever benefit has arisen from the giving the notice, in the way of making a contract, remains unaffected, however this question may be decided. But the real question is, what is the true construction to be given to the 220th section?

Now, with respect to that section, before I speak of the exact words of it, it is observable that the act of Parliament has prescribed what is to be done in cases where the Company is the taker, against the will of the owner, of the owner's land; and the act of Parliament has prescribed, (after giving a general power to purchase, by the 152nd section), "that, for the purpose of providing for the payment and application of the purchase-money," and so on, it is enacted, in the following words, "that if the owner of any such lands or of any interest therein, on tender of the purchase-money or compensation, either agreed or awarded to be paid, refuse to accept the same, or if he afterwards fail to make out a title to the lands, or to the interest therein claimed by him, it shall be lawful for the

(*a*) Ante, Vol. 1, p. 375.
(*b*) Ibid. 135.
(*c*) 3 B. & Ad. 592.
(*d*) 3 My. & Cr. 439.

Company to deposit the purchase-money or compensation in the Bank of England," in a given manner; "and thereupon all the interest in such lands in respect whereof such purchase-money or compensation shall have been deposited shall vest absolutely in the Company;" and having provided that, it then provides, by the 162nd section, "that where, according to the provisions of the act, the Company are authorised to enter upon and take possession of the land required for the purpose of the railway, if the owner or occupier of any such lands, or any other person, refuse to give up possession thereof, or hinder the Company from entering upon or taking possession of the same, it shall be lawful for the Company to issue their precept, under their common seal, to the sheriff to deliver possession to the person appointed in such precept to receive the same, and upon receipt of such precept the sheriff shall deliver possession of any such lands accordingly." Well, then there comes the 220th section, and the 220th section provides, with something like a fair regard to the liberties of mankind in general, as contradistinguished from the special power of interfering with those liberties, which, for the particular purposes of the act, is conferred upon the Company, "that the powers of the Company for the compulsory purchase or taking of lands for the purpose of this act shall not be exercised after the expiration of three years from the passing thereof."

Now, according to the plain meaning of the section to which I have referred, the compulsory power of taking the land consists, where the parties dispute, first of all, in having the amount of the money which shall properly be paid ascertained by the intervention of a jury; then in the payment of the money, so ascertained to be the proper sum, into the Bank, according to the provisions of the 152nd section; and then, if the party does not deliver possession, the Company may issue the precept to the sheriff, and may request the sheriff, and the sheriff is authorised, to give possession accordingly.

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Now, it is said that I am to consider, that, merely because the process of determining, by means of a jury, had commenced before the expiration of the three years, therefore anything which might be necessary to bring the dispute to an end, as to what should be paid, and to enable the Company to exercise its compulsory powers, and issue its precept to the sheriff, might go on after the expiration of the three years. It seems to me that this is flatly in contradiction to the terms of the 220th section, "that the powers of the Company for the compulsory purchase or taking of lands for the purposes of this act shall not be exercised after the expiration of three years from the passing thereof;" and though it is perfectly true, that, to a certain extent, the Company has not the whole three years for the exercise of the compulsory power, because, as it was observed, part is necessarily consumed in determining what ought to be paid; yet it is to be remarked, that the final compulsory power itself is made to depend upon the previous ascertainment, by the intervention of a jury, of what is the sum that ought to be paid in case the parties dispute, and that final compulsory power is the issuing of the precept to the sheriff.

Supposing it were true that I must consider myself bound (which I do not) technically to say that the price is to be taken as having been determined at nine o'clock on the 3rd of July, when the parties met; why did they not pay the money in the course of the day, and in the course of the day issue the precept to the sheriff? I cannot adopt such an hypothesis. The proceedings of the Company themselves forbid me to adopt it; they never dreamt of it, they never attempted to exercise such a power; and it appears to be quite a fantastical thing to say, that when the discussion was going on from Saturday till Monday, and not finished till the Tuesday, this Court is to consider that the whole was over on the Saturday. Supposing it had been, what then? Supposing it had been assented to at once, the dispute would have ceased; still the money is to be paid into court; and there is also the issuing the precept to the she-

riff, and that could not have taken place in effect until after the expiration of the time.

There is this very remarkable circumstance in this case, that it is said to be a hardship on the Company, and so on, because companies are driven to the end of the time allowed for the selection of the places for stations; but it appears that this land is wanted for the purpose of making a station at Whitehaven, which should have been one of the first objects of a company formed for making a railway to Whitehaven. All I am asked to do is to give effect to the plain provisions of the act of Parliament, that the compulsory power shall cease on the 4th of July, which I am bound to do, and the injunction must be granted in the terms of the notice of motion.

August 3rd.

The Company now moved, by way of appeal, to discharge the order of the Vice-Chancellor of England.

Mr. *Stuart* and Mr. *Malins*, in support of the motion.

Mr. *Swanston* and Mr. *Wray*, contrà.

The LORD CHANCELLOR.—The Vice-Chancellor has expressed an opinion that this was one of the clearest cases he ever saw; that the Company were not entitled to go on in procuring the possession of the land under the act of Parliament. Merely looking at the provisions of the act, without taking more time to examine them, I cannot but entertain very serious doubts as to whether the Vice-Chancellor has come to a right conclusion upon them. I do not, however, propose to decide the rights of the parties upon the construction of these provisions, as it is unnecessary for me to do so.

In a case where a company is acting clearly beyond the powers of an act of Parliament, the Court will not hesitate to restrain them by injunction, and to keep them within the bounds prescribed by their act of Parliament. In a case, also, of doubtful construction, the Court may interfere, taking care that the parties have their legal rights

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decided in a court of law. Then the Court either tells them to ascertain their legal rights, and abstains from interfering, or it interferes by injunction in the meantime, according to the circumstances of the case, and the degree of doubt that may exist on the question of law, and also the comparative injury which may be inflicted on one side or the other, if the injunction be granted or refused.

All these are elements of consideration in the question, whether there should be an injunction or not in the first instance. Another ingredient which is not to be lost sight of is, the conduct of the parties themselves. If it rested simply on the construction of the act, I probably should not much hesitate on what course I should adopt. But this Company never commenced setting themselves in action till the month of March. They had made their station about a year before, and from the expiration of that year to the month of March they never attempted to take possession of this piece of land for the purpose of the station. Then these powers were to expire in July; and, although they were so near to the expiration of their power, they certainly were in no great hurry to proceed; for they were bound to give a month's notice before anything was done, and after that it was to stand over for communication with the proprietors, and another month was to intervene before they went to a jury. They actually did nothing from the 5th of March until the 18th of May. They say there was a difficulty in getting the opinion of the valuers. That might or might not have been expedient; but it was quite clear, after the expiration of that first month, that they had to proceed adversely, because the proprietors took no notice whatever of their first communication. Even if they had not, they might have gone on so as to have brought themselves within a reasonable time, even if they had been taking measures to ascertain the value of the property in the meantime. Instead of which, from the month of March to the 18th of May, nothing was done. From the 18th of May to the 19th of June was a necessary interval. From the

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19th of June to the time when it came before a jury, I am not accurately informed whether any time was lost. The result was, that owing to that delay the period when the powers of the act were to expire had arrived before the jury had given their verdict. That raises a question about which I give no further opinion than what I have already expressed; but it is the question between the parties whether, the act of Parliament having said that at that period their power of purchasing and taking the land shall expire, they are prevented or not from going on to complete the purchase of the land of which they had given notice so early as in the month of March.

If I were to dissolve the injunction absolutely, the legal question would remain to be disposed of, because then the Company would continue the course they were obliged to adopt. They would, under the provisions of the act of Parliament, pay the amount the jury assessed, into the Bank, and obtain possession of the land in the way provided for by the act. If their powers for that purpose remain, they would be justified in what they are doing; and, as far as they are concerned, would incur no further responsibility. If, on the other hand, it should turn out that they were not authorised in the course proposed to be pursued, then they would incur great responsibility and expense to no purpose; they would be liable to a very large extent of damage to the plaintiffs for the injury they might sustain, by their property (which they say is very valuable) being taken possession of by the Company.

Again, the plaintiffs make the case that they are now employed in building ships in this yard; they say, that their trade would be materially interfered with, if not destroyed, by their having a part of their yard converted into a railway station.

I think, therefore, there can be no question about the side on which the balance of injury would lie. I cannot think that any very pressing evil will arise to the Company from being prevented from enlarging their station before the opinion

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of a Court of law can be obtained; for I find that they had no notion of wanting the land for the purpose when they made their present station a year ago, and they never thought of enlarging it till the month of March following; and when they did think of enlarging it, they lost so much time, that, if there had not been that delay, in all probability the opinion of a Court of law would have been obtained, so that I might have been able to act upon it now.

I think, on the other hand, that the plaintiffs may sustain great damage by permitting the Company to take possession of their yard, even if they may ultimately recover it; but I think there is no corresponding evil by postponing the period of possession by the Company, if they should prove to be entitled to it.

All that I have said would not be of weight if I could consider the question entirely free from doubt; and although I find the Vice-Chancellor has expressed a very decided opinion that the Company have no such right as they claim, I do not feel it to be my duty, nor am I bound, to decide on the accuracy of that opinion. I am not weighing the question of law at all, but the expediency of postponing the period of decision until the opinion of a Court of law can be obtained in November; and, in doing this, I think I am justified in paying some degree of attention to the opinion of the Vice-Chancellor, by considering that there is, at all events, a reasonable possibility that a Court of law may be of opinion that the Company have not the power they claim.

On the balance of the whole, therefore, as to whether I should dissolve the injunction, or whether I should maintain it, giving the parties leave to go to a Court of law with a case, to know whether the Company are entitled to do what they propose, I think it is in favour of continuing the injunction on a case being directed to the Court of Common Pleas, for the purpose of ascertaining the legal rights of the Company.

There can be no difficulty in stating the case; the facts

are simple, and the question turns upon the construction of the act of Parliament upon those facts. I shall, therefore, continue the injunction, and make the usual order for a case to the Court of Common Pleas.

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BEFORE VICE-CHANCELLOR KNIGHT BRUCE AND THE LORD CHANCELLOR.

In the Matter of an Arbitration between HAWLEY and Others and THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

1848. *Feb.* 15*th*, 16*th*, & 17*th*, & *March* 11*th*.

THIS was a motion to set aside an award, on the following grounds: first, that one arbitrator had, in the absence of the other, and in the absence of any person representing the other side, heard counsel and entered into evidence offered by the party by whom he had been nominated; secondly, that the umpire appointed by the two arbitrators was present at the time counsel was heard and such evidence adduced, although the time allowed to the arbitrators for making their award had not then expired; thirdly, that the umpire had heard no evidence after his authority to act commenced, but had made his award on the evidence alleged to be irregularly taken, without notice to, and without the knowledge of, the Company, their solicitors or agents.

A. & B., whose wharf was about to be crossed by a railway, claimed a larger amount of compensation from the Company than they were willing to give, and the matter was referred to arbitration. The reference was opened, and the business proceeded, in the presence of all parties, on the first day, but on the following day the arbitrator of the Company failed to attend, and their solicitor protested in writing against proceeding in his absence. The arbitrator then present, and the umpire, who was also present, but whose time for acting had not commenced, sent a notice to the other arbitrator of their intention to proceed, and a witness was examined on behalf of A. & B., but no evidence was adduced by the Company. The Company gave notice to the arbitrators and the umpire not to make an award. The time within which the arbitrators were to make their award having expired, A. & B. called on the umpire to make his award, which he did without hearing any evidence except that given by the witness before mentioned. The Company thereupon moved to set aside the award:—*Held*, by the Lord Chancellor, affirming the decision of Vice-Chancellor *Knight Bruce*, that the award so made by the umpire, in the absence of and without notice to one of the parties, was invalid.

If the umpire had given notice to the Company of his intention to make his award, whether, when made, it would have been invalid, *quære*.

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It was also alleged, as another ground for setting aside the award, that the umpire had exceeded his authority, by making his award include matters not referred to him.

The facts were as follow:—The Messrs. Hawley and others were partners and lessees of a certain colliery situate near Stoke-upon-Trent, called the Moss Field Colliery, which was connected with that place by a tramway, terminating in a wharf. The North Staffordshire Railway Company required a small portion of their wharf for the purposes of their act, and they gave the usual notices of their intention to take the land in question, and called on the Messrs. Hawley to send in their claims. The Messrs. Hawley thereupon claimed, as the value of the land and for compensation, a sum of £3380, requiring, at the same time, that the Company should raise the rest of the wharf to the level of, and make them a crossing over the branch line which the Company proposed to carry across their wharf. The Company refused to accede to these terms, and offered £600 as full compensation, which offer being refused, the Company proceeded, under the 85th section of the Lands Clauses Consolidation Act, to deposit the determined value, being the sum of £600, in the Bank; and, having complied with the other requisitions of the statute, they entered into possession of the land.

Messrs. Hawley thereupon gave notice of their intention to submit the question of compensation to arbitration, and appointed A. B. to act as arbitrator on their behalf. The Railway Company, in September, appointed Mr. M'D. as their arbitrator, and the two so appointed, within twenty-one days, appointed L. as umpire in case they should differ. Messrs. Hawley, on opening the reference, claimed £5015. No meeting took place until the 4th of November, to which day the time had been enlarged, when all parties met, and the subject of the reference was commenced. At the close of that day it was proposed that the inquiry should be continued the next day, and the time for making the award was

enlarged to the 19th of November. Before the time for meeting had arrived on the following day, the solicitor for the Company received a letter from their arbitrator, Mr. M'D., stating that it would be impossible for him to attend, at the same time recommending that the reference should be proceeded with, and that he should be furnished with notes of the proceedings. The solicitor of the Company, however, did not think proper to follow Mr. M'D.'s suggestion, but attended at the place of meeting and there protested against the reference being proceeded with in the absence of Mr. M'D., and at the same time called upon the parties to fix another day for that purpose. The counsel, however, who appeared on behalf of Messrs. Hawley, objected to such postponement; and the arbitrator and umpire (who was also present) forwarded a letter to Mr. M'D., requiring his immediate attendance, and giving him notice that, if he did not comply with their request, they should proceed without him.

Mr. M'D. not appearing, the business was commenced, and a witness was called by the counsel for Messrs. Hawley. The solicitor of the Company thereupon withdrew, having formally protested against the parties proceeding in Mr. M'D.'s absence, and delivered a written notice to that effect to the arbitrator and umpire. The examination of the witness was, however, continued. Nothing more was done until the 11th of November, when the Company, by their solicitor, delivered a notice to the arbitrators and the umpire not to proceed to make their award, as such award, if made, would be invalid, on account of the irregularity of the proceedings on the 5th of November.

The time within which the arbitrators were to make their award having expired, the solicitor of Messrs. Hawley gave the umpire notice thereof, requiring him to make his award.

The umpire, in compliance with such requisition, made his award, dated the 29th of November, whereby he awarded to Messrs. Hawley the sum of £3712, and further adjudged

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that the Company should, during the formation of their branch railway, make certain accommodation works for the benefit of Messrs. Hawley.

To this award the objections hereinbefore stated were taken by the Company, and the present application was made to set it aside.

Mr. *J. Russell*, Mr. *Malins*, and Mr. *H. Hill*, in support of the motion, contended that the umpire entered upon his office before he had any authority to act; and anything he had done previously to the expiration of the time within which the arbitrators might have made their award must be considered a nullity; that evidence taken without calling the parties before both arbitrators, much less if taken before one arbitrator alone, was irregular: *Anon.* (*a*). Even if the umpire had the power of examining a witness before his time for acting commenced, he could not adopt evidence so irregularly taken. [The following cases were also cited in support of this motion: *Walker* v. *Frobisher* (*b*), *Fetherstone* v. *Cooper* (*c*), *Dobson* v. *Groves* (*d*), *Re Plews* v. *Middleton* (*e*), *Harvey* v. *Shelton* (*f*), *Phipps* v. *Ingram* (*g*).]

Sir *F. Simpkinson*, Serjt. *Allen*, and Mr. *J. Campbell*, contrà.—The fact of evidence being taken before one arbitrator does not vitiate it. Supposing the attornies on both sides consented that one arbitrator should act, that would not have vitiated the proceeding: *Tunno* v. *Bird* (*h*), *Hall* v. *Lawrence* (*i*), *Waller* v. *King* (*k*), *Johnstone* v. *Cheap* (*l*). This was not a question of fact which required evidence, but the whole matter was already in the knowledge of the umpire.

(*a*) 2 Ch. Rep. 44.
(*b*) 6 Ves. 70.
(*c*) 9 Ves. 68.
(*d*) 6 Q. B., N. S., 637.
(*e*) Ibid. 845.
(*f*) 7 Beav. 455.
(*g*) 3 Dowl. 669. See also Russell on Submissions and Awards, 179.
(*h*) 5 B. & Ad. 488.
(*i*) 4 T. R. 589.
(*k*) 9 Mod. 63.
(*l*) 5 Dow 247.

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There was no collusion in this case; both arbitrators and umpire had been duly served with notice of the reference. In considering the validity of this award, the Court had nothing to do with the acts of the arbitrators: it was sufficient that they had not made their award within the specified time, to invest the umpire with full powers to act; and he need not inquire into the acts of the arbitrators: this award must be considered as the award of the umpire alone. It is provided in all these cases, that, if the parties differ, an umpire shall act. No evidence of their disagreement is required, except the fact of their not having made an award. There is nothing to control the umpire as to the manner in which he is to take evidence; he may adopt his own course. A refusal to hear evidence may vitiate an award, but there is no case in which an award has been set aside on account of irregularity in taking the evidence. It is not an objection to the validity of an award, that the umpire has heard no evidence: *Sherratt* v. *North Staffordshire Railway Company* (*a*), *Soulsby* v. *Hodgson* (*b*), *Ringer* v. *Joyce* (*c*), *Hewlett* v. *Laycock* (*d*), and Watson's Treatise, 121. It is against the general policy to extend the power of questioning awards, which are intended as the means of preventing expensive litigation.

The VICE-CHANCELLOR.—Having read the papers, and formed an opinion of this case after hearing the arguments, I think it is due to the parties not to defer declaring that opinion. Thus much certainly is clear, that neither the case of the respondents nor that of the Company was closed when the meeting of the two arbitrators and of the umpire, held on the 4th of November, terminated, and the proceedings were adjourned to the following day. The meeting of the 4th ended under a well-founded and just belief on the part of all

(*a*) Ante, p. 166.
(*b*) 3 Burr. 1474.
(*c*) 1 Marsh. 404.
(*d*) 2 C. & P. 574.

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concerned, that more was to be done under the reference, with or without argument or evidence, or both. But, on the 5th, Mr. M'D., the arbitrator named by the Company, with or without justification, (perhaps inexcusably), was not forthcoming, and did not attend. It has not, however, been contended, nor do I think, that there was on that occasion a refusal on his part, such as to bring the matter within the 30th section of the Lands Clauses Consolidation Act (*a*), and, of course, there had not been seven days' neglect. Still, the other arbitrator and the umpire, or the former, at least, thought fit to proceed with the business of the reference in Mr. M'D.'s absence, overruling the objection and rejecting the protest of the Company's solicitor against such a mode of acting. Some points or point having been, as I collect, left undecided on the preceding day, or not having been disposed of, witnesses were examined on the part of the respondents, who then, as I understand it, closed their case, the Company's solicitor having declined to adduce on that day the evidence which he said he had to adduce, unless Mr. M'D. were present. I use the expression, "which he said he had to adduce;" but it is not quite certain that he said so. He swears that he had witnesses. I do not know that that is very material. If I were to say, "which he had to adduce," I should certainly be correct. He declined, unless in Mr. M'D.'s presence, then to proceed at all; so the meeting—if meeting it ought to be called—was terminated.

Now, as any power on the part of the umpire did not or was not to arise before the 19th of November (to which day the time had been enlarged), as sect. 30 of the act is out of

(*a*) Sect. 30 is as follows:—"If, when more than one arbitrator shall have been appointed, either of the arbitrators refuse, or for seven days neglect, to act, the other arbitrator may proceed *ex parte*, and the decision of such other arbitrator shall be as effectual as if he had been the single arbitrator appointed by both parties."

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the case, I do not really see how a proceeding on the 5th, on the part of the arbritrator named by Messrs. Hawley and on the part of the umpire, if it be questioned in whole or in part by the respondents, is capable of being supported or upheld. The absence of Mr. M'D. on that day may not probably have been an act of strict propriety on his part, but that did not entitle the other arbitrator and umpire, or either of them, to proceed without him on that day, if there was not a refusal on his part, as I think there was not. Mr. M'D. may have wished—indeed, he expressed a wish—that they should proceed without him; but that did not enable such a course to be taken without the consent of the Company. That consent was refused. If, indeed, the evidence before me were such as to warrant a judicial conclusion in my opinion that his absence on the 5th was at the request and through the instrumentality of the Company or their agent, Mr. K., collusively or fraudulently, the Company would be as much bound by what passed at the meeting as if Mr. M'D. had been there. The evidence, however, is not such as to warrant a judicial conclusion of that kind. A. B. never proceeded, and never professed to proceed, under the 30th section of the act; nor has it been contended, on the part of the respondents, that the award is impeachable under that section. It is the umpire who has made the award, and not the two arbitrators. The irregularity of the meeting of the 5th of November has never been waived on the part of the Company, who, in due time and manner, as I think, objected to the proceedings on that day going on without Mr. M'D., who appears never to have been present afterwards.

It is true that the witnesses examined on the 5th were so examined before A. B. and the umpire; but A. B. (unless under the section already mentioned, which, it is agreed upon each side, has never been called into action) was not competent to act without Mr. M'D.; and as to the argument founded upon his hearing the evidence,

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if evidence it ought to be called, it seems to prove too much.

If it be contended, that on the 5th witnesses were examinable before A. B. and the umpire, without Mr. M'D., it cannot, I suppose, stop short of being contended, that they were so examinable before the umpire alone. The witness, unless sworn before the 5th, was, it seems probable, either unsworn, or not duly sworn. However that may have been, he seems to have been sworn *coram non judice;* nor do I know if, on his examination, the witness had sworn that which was wilfully and corruptly false, an indictment can be, or could be, maintained against him. It is, perhaps, unnecessary to remark the fact, that he was examined in the absence of the Company's solicitor; not a witness was examined after the 5th; not a meeting of any kind was held after that day; nor did an attendance of any kind before the arbitrators and umpire, or any one or more of them, take place after that day. The Company had not, upon, or before, or after it, any notice, either in the shape of summons or otherwise, to attend any person or persons anywhere, either on the 6th or any subsequent day. But on the 22nd the respondent's solicitor, as I collect from his affidavit, informs the umpire that the arbitrators had not made an award, and that it would be necessary to trouble him further in the matter, and requests his early attention to it; and on the 29th the award is made, without any evidence on behalf of the Company having been given.

And here it may be right for me to remark, that, in my opinion, the materials before the Court are not such as to justify a judicial conclusion upon the point, whether the evidence of the witness examined on the 5th November was disregarded by the umpire, or whether it had any weight with him in deciding as he decided. The presumption must, I think, be, that it was not disregarded; and there is not, I conceive, anything on the face of the award, or in the evidence, to rebut, displace, or weaken that pre-

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sumption. The award itself, and the evidence generally, seem to me rather to strengthen it. The award, however, notwithstanding the expression "their witnesses" contained in it, was made, as I have said, without any evidence having been adduced on the part of the Company; and it must be so determined. But then it is said, that the absence of evidence on their part arose from this, that they had not any evidence to adduce, or did not wish to adduce any, or were in default in that respect, so as to preclude them from saying effectually that they had evidence to tender.

Now, it is not a just inference from the materials before me, to decide that they had not evidence to adduce, or that they did not mean to adduce any. But were they in default? That question also seems answered by what I have already said. The respondents have contended, that, as a general rule, it is not incumbent on an umpire to receive evidence, or to be active in summoning or advising as to any notice to either of the parties in dispute, before making his award. That may or may not be so. I apprehend, however, that the question for my consideration on this part of the case is not upon the general rule, but whether, upon the particular and special state of circumstances which existed here, including what had taken place on the 4th and 5th, and the notice on the 11th—with reference to which I do not forget the provision against revocation in the 25th section of the act—it was incumbent upon this particular umpire, either not to make any award at all, or not to proceed to make his award without previously giving, or requiring the respondents to give, to the Company an intimation, and tendering to them an opportunity expressly of producing evidence before them, or attending and addressing them: and I am of opinion, that the question ought to be answered in the affirmative.

Assuming the umpire's intentions to have been those of an honest man, as probably they were, I find myself un-

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able to say that I concur in the course which, under the circumstances, he took. He could not suppose that the case on the other side was closed on the 4th; plainly it was not so. He was, in my judgment, bound to treat all that took place on the 5th as nothing, and to act as if the meeting of the 5th had not taken place. In this sense, at least, he was bound to take up the matter entirely *de novo*, from the close of the proceedings on the 4th; but he did not do so. His supposed general professional knowledge, experience, and personal observation, enabling him, as it is said, to decide between the parties without any evidence whatever, must, in the present case, without disrespect to him, go for nothing.

Upon the whole, I am unable to see how, under the combination of circumstances referred to, the award can stand. I think it bad upon the grounds I have mentioned, without saying whether there are or are not any other grounds sufficient of themselves to invalidate it. The award must, in this view of the case, be set aside.

From this judgment the Messrs. Hawley appealed.

The case was argued by the same counsel as in the court below.

March 11th. The LORD CHANCELLOR.—The principal objection to the award is, that it was made without communication with the Railway Company; and the question is, whether an award so made, and in the absence of and without notice to one of the parties, can be supported? In looking into the cases cited, I do not find that they apply. In the present case, the Company gave the umpire notice not to proceed, and if he did, that they would not be bound by his decision, by reason of the irregularity. If the umpire had legal powers under the acts of Parliament to go on to make his award without notice to the Company, his power would not

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be less notwithstanding the want of notice. But still he knew they would object, and they expected he would not proceed. In *Scott* v. *Van Sandau* (*a*), the case chiefly referred to, the arbitrator gave the party notice that he would make his award on a day named; so there it was the party's own fault, and not the arbitrator's, for he gave a distinct notice that he would proceed.

The absence of the Company's arbitrator is not satisfactorily accounted for; it would seem as if they wished to escape from the reference. The umpire attended to hear the evidence before the arbitrator, his object being to save the trouble and delay of examining the same witnesses over again. But he knew it was a case to be decided on a knowledge of fact, and ought to have heard the evidence on both sides. The time for the decision of the arbitrators having expired on the 19th of November, the whole jurisdiction fell on the umpire on the 20th. It is to be assumed, that he heard all the evidence that was given before the arbitrators; but still the question is, whether an award made without hearing the evidence on both sides, and without notice to one of the parties, is valid? If the umpire had given the Company notice that he would proceed to his award, then the case of *Van Sandau* would have applied. It was his duty to have given that notice. On these grounds the award must be held to be void, and the Vice-Chancellor's order must be affirmed, with costs.

(*a*) 4 P. & D. 725; 1 Ad. & E., N. S., 102.

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COURT OF BANKRUPTCY.

BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

May 4th. *Ex parte* CLARKE, *Re* THE TRING, READING, AND BASINGSTOKE RAILWAY COMPANY.

U. applied for shares in a projected Company, and ten were allotted to him, on which a deposit of 5*l.* 5*s.* was to be paid on the 9th of October. He paid the deposit on the day appointed, and obtained the banker's receipt, but did not then, or afterwards, execute the parliamentary deeds or subscription contract, and consequently no scrip was delivered to him. The projected Company was declared bankrupt, and U. applied to prove for the amount of the deposit. The proof was admitted by the commissioner, whereupon the assignees appealed to the Vice-Chancellor. The respondent, U., having failed to prove that he was prevented from executing the deeds, or from obtaining his scrip, by any act of the Company, or that any fraud had been exercised on him by the Company—*Held*, that the proof must be expunged.

THIS was a petition presented by the assignees of the above-named Company, by way of appeal from the decision of one of the London Commissioners in Bankruptcy.

The facts were as follow:—

Mr. U., in answer to an application for shares in the above-named projected Company, received a letter of allotment, dated 30th September, 1845, in the following form:—

"Sir,—The provisional committee having at your request allotted you ten shares, I am requested to inform you that a deposit of *5l. 5s.*, amounting to *52l.* 10*s.*, must be paid on or before the 9th October, to one of the undermentioned bankers, who will give you a receipt for the same, as so much money received on account of the Company, which receipt will have to be exchanged for scrip certificates on the subscribers' agreement and parliamentary contract being signed. The directors reserve to themselves the power of revoking this letter of allotment, on default of payment of the deposit on the above-mentioned day."

The names of the bankers were then subscribed, and the following note was at the foot of the letter:—"No person

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can sign for another, except by power of attorney, which may be obtained at the office, at the expense of the party applying; and the parliamentary contract and subscribers' agreement must be executed within a month from the transmission of the letter of allotment."

On the 9th October Mr. U. paid the deposit on his ten shares into the hands of one of the bankers named in the letter of allotment, and obtained a receipt for such payment, but he did not then or at any other time execute the parliamentary contract or the subscribers' agreement.

In September, 1846, the Company was dissolved, under the provisions of the 9 & 10 Vict. c. 28; and on the 3rd of October a fiat in bankruptcy issued against the Company. Mr. U. thereupon applied to prove for the sum of 52*l.* 10*s.*, the amount of deposit paid by him in respect of his shares; and although his application was opposed by the assignees, the present petitioners, his claim was admitted to proof by the commissioner.

The assignees thereupon presented this petition, praying that the proof might be expunged, and that the dividend warrant, (if any), issued for the amount of the dividend upon the said proof, might be cancelled, and that the costs of the petitioners might be paid out of the estate.

Mr. *Russell* and Mr. *Willes*, in support of the petition, contended, that although Mr. U. had never signed the parliamentary contract or subscribers' agreement, he had paid the deposit under the terms of those deeds, and it became, to all intents and purposes, subject to the same liabilities as the general funds subscribed by the other shareholders; that the respondent had only the right to share in the surplus after the creditors of the Company had been satisfied. [The cases of *Garwood* v. *Ede* (*a*) and *Clement* v. *Todd* (*b*) were cited.]

(*a*) Ante, p. 134. (*b*) Ante, p. 132.

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Mr. *T. H. Terrell* and Mr. *Logie*, contrà, contended, that the fact of the respondent never having obtained his scrip certificates proved that the Company had not received the deposit to the extent of making it liable for the losses of the Company; that, from the wording of the letter of allotment, it was quite clear that the deeds must be signed before the parties would be entitled to the shares. Mr. U. did not pay in his deposit within the time prescribed by that letter; and, consequently, did not become entitled to his shares. How then could he be treated as a shareholder? They also relied on an affidavit of the respondent, stating that there had only been a partial allotment of shares; that a great many had been reserved, or allotted to persons who had never paid the calls thereon; and charging the directors with various acts of misfeasance in the expenditure of the funds of the Company. They further contended, that the respondent had done no act by which he had placed himself in the situation of a shareholder, or rendered himself liable for the expenses of the Company: *Nockells* v. *Crosby* (*a*); *Walstab* v. *Spottiswoode* (*b*).

The VICE-CHANCELLOR.—This is the case of a bankruptcy, not of an individual, nor of any number of individuals, but of a special and particular bankruptcy of a Company, under the provisions of the 9 & 10 Vict. c. 28. The question whether the present respondent is entitled to prove must depend upon this, namely, whether, at the time of the bankruptcy, the Company were indebted—that is, whether, at the time of the bankruptcy, if the event of the bankruptcy had not happened, he had a right to sue for the money constituting the alleged debt, in respect of which he now seeks to prove. He seeks to prove in respect of a sum of fifty guineas paid to the Company under the letter of allotment. If a few individuals of the Company, or any

(*a*) 3 B. & C. 814. (*b*) Ante, Vol. 4, p. 321.

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individual connected with the Company, had defrauded him in respect of this payment, it would not be material now, unless the fraud were the act of the Company, because the application is against the Company. Now, I do not see any evidence to satisfy me that the Company obtained the money from the respondent by fraud. He meant to contribute his money to a fund, upon which contribution he would place himself in the same position, whatever that might be, as a number of other persons, also contributors, or who were to become contributors, and he was to receive a scrip certificate. Now, if, upon application for a scrip certificate, he had been refused—if he had established such a case that judicially it could be said that the conduct of the Company amounted to a refusal, it may be that he would have established his case. But I am not satisfied that any such refusal has, upon the evidence, been established. It may, however, be said, that even if such refusal had been established, he would not have entitled himself to sue for the money, without having given some notice of rescinding the contract or demanding the money. Upon that I give no opinion. It does not appear in this case that before the bankruptcy he either demanded the money or gave any notice of rescinding the contract. Upon what ground, then, can I say that the Company, or an immense body of other individuals, the other contributors who had received from him this addition to the common fund, were liable to repay him in particular before the bankruptcy? The circumstances of the bankruptcy cannot, in my judgment, give the right. He must establish a case of legal or equitable debt before the bankruptcy: that is, that a state of things existed in consequence of which all the other members of the Company were bound to pay him especially this sum which he had contributed to the common mass. No such case has been made out. He is not entitled to call for his money any more than the other contributors; and if all of them had a right to demand their money, there

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would not be wherewithal to pay. They all stand upon an equal footing, having a right to share in the ultimate residue. What reason, then, is there for placing one in a better position than another? I confess I do not see any. My impression is, that there is not any debt. I am much relieved from the embarrassment and difficulty which I might otherwise have felt in differing from the learned commissioner, by this—that I am convinced that the argument and the evidence adduced here have been more extensive than what were brought before him. I think that the case before me and before him cannot be considered as the same. I am of opinion that the right of proof is not established.

His Honor said he should reserve the question of costs until Saturday, and that he wished then to be informed whether it was the intention of the respondent to appeal—a proceeding which he meant neither to encourage nor discourage.

On Saturday, the counsel for the respondent stated that he did not intend to appeal from the decision of his Honor. His Honor then gave him his costs of the petition out of the estate.

BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

June 21st.

Ex parte WARD, *Re* THE MIDLAND RAILWAY COMPANY.

The lessee of certain land and the reversioner entered into a joint agreement with a Railway Company for the sale of their entire interest in certain messuages required by the Company. An application by the lessee to have the gross sum, which had been paid into court by the Company, apportioned between himself and the reversioner, under the 74th section of the Lands Clauses Consolidation Act, refused.

THIS was a petition presented by Mr. Ward, praying the apportionment of the purchase-money paid into court by a Railway Company, between himself and the Dean and Chapter of Lincoln. It stated that the petitioner was

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lessee of certain houses in the city of Lincoln, under a demise, dated the 3rd November, 1845, for a term of twenty-one years, at a small rent.

The Midland Railway Company required a portion of these premises for the purposes of an act, with which the Lands Clauses Act was incorporated, obtained by them for making a railway from Nottingham to Lincoln.

Under an agreement, bearing date the 17th of April, 1846, the Dean and Chapter, acting with Mr. Ward, jointly agreed to sell to the Company the part of the land required by them for £1760, which amount was accordingly paid into court.

Mr. *Bacon* and Mr. *Freeling*, for the petitioner, submitted, that, although there was no section of the general act particularly applicable to the present case, it appeared to them to come within the provisions of the 74th section, by which the Court was invested with the power of giving the petitioner the same benefit from the money paid in respect of a lease as he might have had from the lease, or "as near thereto as may be."

Mr. *Roundell Palmer*, for the Dean and Chapter, submitted, that the agreement, being a joint agreement to sell, by the lessee and reversioner, for one gross sum, took the matter out of the 74th section (*a*), which only provided for

(*a*) Section 74 is as follows:— "Where any purchase-money or compensation paid into the Bank, under the provisions of this or the special act, shall have been paid in respect of any lease for a life or lives or years, or for a life or lives and years, or any estate in lands, less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the Court of Chancery in England, on the petition of any party interested in such money, to order that the same shall be laid out, invested, accumulated, and paid, in such manner as the said Court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion, in respect of which such money shall have been paid, or as near thereto as may be."

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cases where a fixed sum had been paid in respect of a lease, or less interest than the fee simple; that there was no power of apportionment given to the Company under that section; and that this case properly came within the terms of the 69th and 70th sections of the general act (*a*).

Mr. *Speed* appeared for the Company.

The VICE-CHANCELLOR thought this was a case of too great doubt to justify his acceding to the prayer of the petition, and refused to make any order upon it.

It was afterwards agreed by consent between the parties,

(*a*) The 69th section provides, "That, if the purchase-money or compensation, which shall be payable in respect of any lands purchased or taken by the promoters of the undertaking, from any person having a partial or qualified interest in such lands, and not entitled to sell or convey the same, except under the provisions of this or the special act, amount to or exceed the sum of £200, the same shall be paid into the Bank, with the privity" &c., "and such monies shall remain so deposited until the same be applied to some one or more of the following purposes; that is to say, in the purchase or redemption of land-tax," &c.; "in the purchase of other lands, to be conveyed, limited, and settled upon the like uses, trusts, and purposes, and in the same manner as the lands, in respect of which such money shall have been paid, stood settled; or, if such money shall be paid in respect of any buildings taken under the authority of this or the special act, or injured by the proximity of the works, in removing or replacing such buildings, or substituting others in their stead, in such manner as the Court of Chancery shall direct; or in payment to any party becoming absolutely entitled to such money."

Sect. 70. "Such money may be so applied as aforesaid, upon an order of the Court of Chancery in England, made on the petition of the party who would have been entitled to the rents and profits of the lands in respect of which such money shall have been deposited; and, until the money can be so applied, it may upon the like order be invested by the said Accountant-General in the purchase of £3 per Cent. Consolidated, or £3 per Cent. Reduced Bank Annuities, or in Government or real securities, and the interest, dividends, and annual proceeds thereof paid to the party who would, for the time being, have been entitled to the rents and profits of the lands."

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with the sanction of the Court, that an order should be taken to invest the purchase-money, the dividends to be paid to Mr. Ward, the petitioner, for the residue of his term, or until further order, without prejudice to any question; Mr. Ward undertaking to pay the rent reserved by the lease, at the times and in the manner thereby provided.

BEFORE VICE-CHANCELLOR KNIGHT BRUCE AND THE LORD CHANCELLOR.

1847. *Nov.* 11*th* & 18*th*.

1848. *Feb.* 9*th*, *April* 15*th*, *June* 8*th*, 24*th*, & 28*th*.

BARKER *v.* THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

A Railway Company gave notice that they required ten

THE plaintiffs in this case were the executors of G. Barker, who died possessed of a lease for a term of years, which parcels of land, on one of which was a brine-pit and steam-engine connected with certain salt-works. The parties could not agree upon the price. The Company then caused a valuation to be made of eight out of the ten parcels; they deposited the determined sum, and gave a bond under their corporate seal, but without sureties, and entered upon the eight parcels, under the 85th section of the Lands Clauses Act. The plaintiffs then filed their bill stating these facts, and praying an injunction to restrain the Company from entering on the two pieces of land not included in the valuation, and also from entering upon or continuing in possession of the other eight pieces until they had paid the purchase-money and compensation for their interest in all the lands comprised in the notice. Vice-Chancellor *Knight Bruce* granted the injunction as prayed. The Company then made a further valuation of the two pieces of land omitted in the former valuation, deposited the determined sum in addition to the former amount, and delivered a new bond with sureties. They then moved before the Lord Chancellor to discharge the order for the injunction:—*Held*, affirming the decision of Vice-Chancellor *Knight Bruce*, that the injunction had been rightly granted; that the appeal motion could not be sustained by the subsequent proceedings of the Company; and it was dismissed with costs. The Company moved, before Vice-Chancellor *Knight Bruce*, to dissolve the injunction, when the plaintiffs alleged, that the subsequent proceedings of the Company were not a compliance with the requisitions of the act; and his Honor, being of that opinion, dismissed the motion accordingly:—*Held*, by the Lord Chancellor, on appeal, that the motion stand over, with liberty to the plaintiffs to bring their objections to the subsequent proceedings of the Company by supplemental bill.

The Company gave notice of their intention to summon a jury to assess the value.

The plaintiffs then filed a supplemental bill bringing the new case before the Court, by which they alleged that the premises about to be taken were part of a manufactory, and praying the continuance of the former injunction, and also an injunction to restrain the Company from issuing a warrant to summon a jury to assess the value of less than the whole manufactory. The Vice-Chancellor continued the original injunction, and granted a new injunction according to the prayer of the supplemental bill:—*Held*, by the Lord Chancellor, discharging part of the order of Vice-Chancellor *Knight Bruce*, that the injunction granted by him on the supplemental bill be dissolved. That parties are not entitled to the benefit of the extraordinary interference of the Court by injunction, who, when they might bring forward their whole case at once, bring forward a part only, and when that fails, re-model their bill and rely on an entirely different equity.

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would expire in September, 1865, of certain salt-works, lands, and premises occupied therewith, called The Malkin's Bank Salt-works, at Sandbach, in Cheshire, consisting of, buildings containing the pans, drying-houses, and warehouses for manufacturing and storing the salt in, and adjacent and connected therewith were two brine reservoirs, and a brine-pit which was distant about thirty-eight yards from the reservoirs, but connected with them by an iron tube, through which the brine was pumped from the pit by means of a steam-engine. These premises were subject to a yearly rent of £80, but had been underleased for a term of twenty-one years, commencing from 1833, at an improved yearly rent of £315.

On the 4th February, 1847, the Company, proceeding under the 18th section of the Lands Clauses Consolidation Act, delivered to the owners and occupiers of the premises the usual notices, dated the 3rd of February, containing a description of the land they wanted, and requiring the persons on whom the notices were served to send in the particulars of their estate and interest in such lands, and at the same time offering to treat for the purchase. Annexed to the notices were a schedule and plan of the particulars, from which it appeared that the Company required to take ten parcels of land—one acre and twenty-two perches in the whole. In the schedule, parcel 164 *a* was described as "engine-house and brine-pit;" and parcels 169 and 169 *a*, "brine reservoir." The rest of the premises was described as "garden, grass, and arable land, and buildings." According to the deposited plans, the railway would pass in a line between the brine-pit and engine and the reservoirs.

Negotiations were then commenced between the plaintiffs and the Company, but no terms were agreed on, in consequence of the plaintiffs demanding a sum alleged by the Company to be equal to the value of the plaintiffs' interest in the entire manufactory.

The Company thereupon proceeded, under the 85th sec-

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tion of the said act, and without any communication with the plaintiffs, to cause a valuation to be made of so much only of the premises comprised in the notice as was then absolutely required by them for their railway, and they deposited the sum of £50, being the determined value of eight only of the ten parcels of land comprised in their notice, and executed and delivered a bond conditioned for the payment of all such purchase-money and compensation as might be determined to be payable by the Company in respect of the lands entered upon by them. This bond, dated the 30th October, 1847, was under the common seal of the Company, but without sureties, and the schedule annexed to it omitted the closes 164 *a* and 166.

On the 6th November following, the plaintiffs filed their bill, praying an injunction against the Company to restrain them from entering upon the lands and premises in the notice of February, 1847, numbered 164 *a* and 166, or, if they had entered, from continuing in possession and from proceeding to construct their railway across those closes, and also from continuing in possession and proceeding to construct their railway, or any works, &c., across any of the parcels mentioned in the notice, without the consent of plaintiffs, or until the defendants should have paid to the plaintiffs the purchase-money and compensation for their interest in the lands comprised in the said notice.

The plaintiffs, by their counsel, now moved, upon notice, for an injunction according to the prayer of the bill; but his Honor, Vice-Chancellor *Knight Bruce*, on a statement by the counsel for the Company, that they had not had an opportunity of answering plaintiffs' affidavits, granted an interim order until the 18th November, when the application for an injunction was renewed. *Nov.* 11*th.*

Mr. *Russell* and Mr. *W. T. S. Daniel*, for the plaintiffs, objected, first, that the sum deposited was not nearly the value of the premises, and that it only professed to be the

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value of a part of the premises comprised in the notice; that the closes 164*a* and 166 were entirely omitted from the valuation; secondly, that the notice itself was a binding contract on the Company to take the whole, and that they could not now take less or vary that contract; thirdly, that the bond given by the Company ought to have been with sureties.

Mr. *Malins*, for the Company, contended, that, although he admitted the whole of the premises comprised in the notice must eventually be valued and taken, the words of the 85th section (*a*) only required the Company at that time

(*a*) Sect. 85. "Provided also, that, if the promoters of the undertaking shall be desirous of entering upon and using any such lands before an agreement shall have been come to, or an award made, or verdict given for the purchase-money or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking to deposit in the Bank, by way of security, as hereinafter mentioned, either the amount of purchase-money or compensation claimed by any party interested in or entitled to sell and convey such lands, and who shall not consent to such entry, or such a sum as shall by a surveyor, appointed by two justices, in the manner hereinbefore provided in the case of parties who cannot be found, be determined to be the value of such lands, or of the interest therein which such party is entitled to or enabled to sell and convey; and also to give to such party a bond, under the common seal of the promoters, if they be a corporation, or, if they be not a corporation, under the hands and seals of the said promoters, or any two of them, with two sufficient sureties, to be approved of by two justices, in case the parties differ, in a penal sum, equal to the sum so to be deposited, conditioned for payment to such party, or for deposit in the Bank, for the benefit of the parties interested in such lands, as the case may require, under the provisions herein contained, of all such purchase-money or compensation as may in manner hereinbefore provided be determined to be payable by the promoters of the undertaking in respect of the lands so entered upon, together with interest thereon, at the rate of £5 per cent. per annum, from the time of entering on such lands until such purchase-money or compensation shall be paid to such party, or deposited in the Bank for the benefit of the parties interested in such lands, under the provisions herein contained; and, upon such deposit, by way of se-

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to make a valuation of so much of those premises as they were about to enter upon; that they were not bound to value and give security at once for the whole; that the terms of the 89th section justified this view, for the promoters of any undertaking were not to be liable for the penalties therein mentioned, "if they shall *bonâ fide* and without collusion have paid the compensation, agreed or awarded to be paid in respect of the said lands, to any person" &c. (*a*), "the said lands" being described in the former part of the section as "any lands which shall be required to be purchased or permanently used for the purposes of the special act;" that there was nothing in the 68th section (*b*) inconsistent

curity, being made as aforesaid, and such bond being delivered or tendered to such now-consenting party as aforesaid, it shall be lawful for the promoters of the undertaking to enter upon and use such lands without having first paid or deposited the purchase-money or compensation, in other cases required to be paid or deposited by them before entering upon any lands to be taken by them, under the provisions of this or the special act."

(*a*) Sect. 49. "Where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done, or to be done, to the lands held therewith, the jury shall deliver their verdict separately for the sum of money to be paid for the purchase of the lands required for the works, or of any interest therein belonging, to the party with whom the question of disputed compensation shall have arisen, or which under the provisions herein contained he is enabled to sell or convey, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands, by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special act, or any act incorporated therewith."

(*b*) Sect. 68. "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for, or injuriously affected by, the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction, under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of £50, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and, if such party desire to have the same set-

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with this view of the case, and nothing to hinder the Company from calling one or more juries, or proceeding to one or more arbitrations. The case of *Bridges* v. *The Wilts, Somerset, and Weymouth Railway Company* (*a*) shews that all these proceedings of the Company may be done without notice to the landowner; and all they have to do is, before entering, to give security to him for so much land as they require: *Stone* v. *The Commercial Railway Company* (*b*). As to the objection to the bond, he contended that the words in the 85th section, requiring a bond with sureties, were only applicable to the case of projected companies not yet incorporated; that this being an incorporated company, all that was required to legalise any instrument was the affixing the corporate seal: *Doe* v. *Hogg* (*c*).

The VICE-CHANCELLOR.—My impression is, on both points, with the landowner. My present impression is, that

tled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands, in respect of which he claims compensation, and the amount of the compensation so claimed therein; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration, in the manner herein provided; or, if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same, in the manner herein provided; and, in default thereof, they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts."

(*a*) Ante, Vol. 4, p. 623.
(*b*) Ante, Vol. 1, p. 375.
(*c*) 1 B. & P. 306.

there is quite enough for the purposes of the injunction, and I shall grant an injunction until answer or further order, the Court being open to the defendants to move to dissolve it, on new facts, if necessary, and if they think it advisable. There must be a more extended compliance, in my view, with the requisitions of the 85th section of the act.

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Affidavits were filed on both sides.

The affidavits filed on behalf of the plaintiffs stated, that the amount claimed by them was £4600; that the damage done to the manufactory would render the continuance of the works impossible; and that it would be necessary to rebuild the manufactory, and that the amount awarded was altogether inadequate.

The affidavits filed on behalf of the Company stated, that a further valuation of the two pieces of land not comprised in the former valuation had been made by Mr. T., a surveyor, appointed for that purpose, and that the sum of £3, by him found to be the value of the two additional pieces, had been deposited: that the damage to the plaintiffs' premises was trifling, and was easily to be remedied, by the formation of new brine-pits, and by the removal of the steam-engine to another part of their land. It also appeared that the Company served upon the plaintiffs a bond, dated 3rd January, 1848, under their common seal, with two sureties, which was, in part, as follows:—"The Company bind themselves and their successors, and [the sureties] bind themselves and their and each of their heirs, executors, and administrators."

Mr. *Malins*, on behalf of the Company, now moved, before the Vice-Chancellor *Knight Bruce*, to dissolve the injunction, on the ground that they had, since the date of the order, complied with the terms of the 85th section.

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Mr. *W. T. S. Daniel*, for the plaintiffs, contended, that the Company had entered upon the land illegally, and without having complied with the terms of the act; that having

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so entered they could no longer avail themselves of the 85th section, the sole object of which was to give railway companies the power of entering; that that section could not be held to apply to cases where the company were already in possession; that, by their wrongful entry, they had deprived themselves of all benefit under the 85th section. He also contended, that the subsequent valuation and deposit, in respect of the two omitted pieces of land, could not be considered as rightly made under the original appointment, which contemplated a single valuation and deposit in respect of the whole matter; that the surveyor was a person in the pay and employ of the Company; that the signature of the valuer was not at the foot of the nomination, and also that the valuation did not profess to be an estimate of the estate and interest of the plaintiff in the land, but of the land itself, and that it did not appear that the surveyor had estimated the damage or injury particularly provided for by the 63rd section of the general act; that the brine-pits and steam-engine were part of the manufactory; and that if the Company interfered with any part of the plaintiffs' manufactory, which he contended the brine-pit and steam-engine were, they were bound, under the 92nd section of the general act, to take the whole manufactory; that the bond was not in accordance with the act, in that it appeared to be the several bond of the Company and the joint bond of the sureties, whereas it ought to have been the joint and several bond of the Company and of the sureties.

Mr. *Malins*, in reply, in addition to the arguments adduced by him on the application for the injunction, contended, that the case made by the bill did not go to the extent of requiring the Company to take the whole manufactory; it only stated, that the brine-pits and steam-engine would be injuriously affected by the entry of the Company; and although the plaintiffs, by their counsel, now offered to sell the whole of the salt-works, that would

not entitle them to the continuance of the injunction, which had been obtained on quite a different ground. The case on which the plaintiffs obtained their order for an injunction was founded solely on the Company not having complied with the requisitions of the 85th section. They had now put themselves right in this respect, and they were entitled to have the injunction dissolved. He further stated, that the Company were ready and willing to make good all damage done to the plaintiffs' premises, and to make new brine-pits and works as commodious as those then existing.

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KNIGHT BRUCE, V. C.—Although I am not sure the injunction in force in this cause is not, and I rather suspect that it is, larger than I meant it to be, it does not become necessary for me to decide whether it was expressed in terms too wide, because the defendants have not contended that it was granted or is expressed improperly or informally. Their application to dissolve it is grounded altogether upon matter which has arisen subsequently to the time of granting it; the only question argued before me, on the part of the defendants at least, having been, whether, since it issued, the defendants have so fulfilled the conditions and complied with the requisitions of the 85th section of the statute called the Lands Clauses Consolidation Act, 1845, as to have entitled themselves under that section to enter upon and use the lands in question.

Feb. 9th.

Now, as to this, I think generally, if not universally, and in the present instance certainly, it is incumbent upon those who seek to avail themselves of this section against a landed proprietor to shew satisfactorily and clearly that they have fulfilled its conditions and complied with its requisitions. If there is room for doubt, the landed proprietor must, I conceive, have the benefit of that doubt. Viewing the case in this way, I cannot represent myself as being satisfied that the defendants have fulfilled those conditions or complied with

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those requisitions. Perhaps it is right to suppose, that Mr. Thompson was a proper person to be appointed by the justices for the purpose for which he was appointed. Perhaps it may be reasonable to presume, that before entering upon the duty of making the valuation he had made and subscribed the declaration required by the 60th section; and perhaps the declaration may be taken to have been at the foot of the nomination, however the word "foot," or "end," in the Wills Act, may have been construed; and perhaps in general it is not necessary that a surveyor, acting under the 85th section, should expressly state or shew that he has had regard to the provisions of the 63rd section. But there are some particular circumstances about the present case; and, looking at all that has occurred between the parties to the contest, I am not satisfied that I ought, from the materials before me, to infer that Mr. Thompson, in fixing the sum of £53, either had regard to the provisions or the principle of the 63rd section. Again, I am not perfectly satisfied, looking at the times when and the circumstances under which the two sums of £50 and £3 were paid into the Bank, that they were so paid as that the defendants can be considered as having properly complied with the 86th section; and further, I may observe, that the subject of Mr. Thompson's valuation, as stated by him, seems to me to differ from the subject that he is alleged to have been appointed by the two justices to value—a remark which I make independently of the observation, that the language of his valuation may be thought not sufficiently to identify the subject to which it related, or the authority, nomination, or appointment under which he was acting. Moreover, I think it right to state, that I doubt very much whether, if the defendants were to be assumed to be right in this matter in everything but the bond, that instrument is so worded or so expressed as to be conformable to the statute.

On the whole, considering what the nature of the 85th section is, and what are the rights and duties of the parties

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before me independently of it; considering, also, that the defendants put their case for dissolving the injunction solely and mainly upon that section, and their alleged compliance with its terms, I think I must say they have not shewn grounds on which they ought to be relieved from the injunction; and I must refuse the motion, reserving the question of costs.

I may add, that I have not omitted to observe the 91st and 92nd sections, although in what I have said I have treated the case as not affected by the 92nd section, which, however, may possibly be thought relevant, and, of itself, fatal to the defendants' application, were there nothing else unfavourable to them. I am not sure that the defendants are not seeking to take part only of a manufactory, the owners being able and willing to sell the whole. One of the meanings of the word "manufactory" may be, a place where manufactures are carried on. I doubt whether the parcels which the Company seek to take are not part of the plaintiffs' salt manufactory.

March 25th.

Mr. *Stuart*, on behalf of the Company, now moved, by way of appeal, before the Lord Chancellor, to discharge the order of the 18th November, 1847, granting the injunction. He contended that the original proceedings of the Company were within the powers conferred on them by the Lands Clauses Consolidation Act, and that the requisitions of the 85th section had been complied with. He was then proceeding to argue in the alternative, that, if they were not right originally, they had, at all events, set themselves right by the subsequent valuation, deposit, and bond, when

Mr. *W. T. S. Daniel*, for the plaintiffs, objected, that, under the present notice of motion, which was confined to discharging the original order by which the injunction had been granted, it was not competent for them to introduce new facts which had taken place subsequently to the date of that order.

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The LORD CHANCELLOR allowed the objection, and said—I do not give any opinion on the act of Parliament; but, on the fact of your proceeding for only eight out of ten pieces, I think the Vice-Chancellor was right, and I dismiss the motion, with costs.

On the application of Mr. *Stuart*, for the Company, liberty was given to serve a new notice of motion.

April 15th. The Company, having served a new notice, renewed their motion, by way of appeal from the judgment of the Vice-Chancellor, to dissolve the injunction.

In the course of the argument, his Lordship observed: "Although the plaintiffs cannot obtain an injunction upon subsequent matters without filing a supplemental bill, yet, the defendants moving to dissolve the injunction, I cannot dissolve it until I know under what circumstances it has been granted; as it is, the case cannot go on. There is no means of dealing with the motion without giving the plaintiffs liberty to file a supplemental bill. I cannot enter into it, and I cannot deprive the parties of the injunction until they have had an opportunity of bringing before me what they have done subsequently to the injunction."

His Lordship then ordered the motion to stand over, with liberty to the plaintiffs to take such proceedings as they might be advised.

April 24th. In the meantime, and before the appeal motion was renewed, the Company served a notice upon the plaintiffs, dated the 17th April, 1848, which, after reciting the former notice, and also that the plaintiffs had failed to state their claim, or to treat, or to have the matter settled by arbitration, gave notice that the Company intended to summon a jury, and that they should, after ten days, issue their warrant to the Sheriff of Cheshire for that purpose, and offering the sum of £53 for the plaintiffs' interest.

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In consequence of the judgment of the Lord Chancellor, the plaintiffs, on the 8th May, 1848, filed a supplemental bill, charging, in addition to the facts stated by the original bill, that the Company had not included in their valuation of the plaintiffs' premises the compensation for severance, and that such damage would amount to £2000; that the proposed line of railway would destroy all means of communication between the brine-pit and the reservoirs; that it was absolutely necessary that the brine-pit and reservoirs should be on the same side of the railway as they then were. And the bill further charged, that the hereditaments, which the Company had given notice to take, formed and were part of a manufactory, within the meaning of the 92nd section of the Lands Clauses Consolidation Act; and that the Company were not entitled to require the plaintiffs to sell their interest in the said lands and hereditaments so required to be taken and used, being part of the said manufactory, if plaintiffs were willing and able, as in fact they then were willing and able, to sell their interest in the whole manufactory, and that therefore the Company were bound to purchase the whole, and they ought to issue their warrant to assess the purchase-money or compensation for the whole manufactory. That a jury summoned under the notice of the 24th April would not have jurisdiction to assess the value of the whole, but would be limited to those parts comprised in the original notice of February, 1847.

The bill prayed, that that bill might be considered supplemental to the original bill; that the order of the 18th November, 1847, might not be discharged or varied, and that the injunction issued in pursuance thereof might be continued; and also that an injunction might be granted to restrain the Company from issuing their warrant to the sheriff, requiring him to summon a jury for the purpose of assessing the purchase-money or compensation to be paid to the plaintiffs for their interest in the lands comprised in the notice of the 3rd February, 1847, or for any other purpose

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than for the purpose of assessing the purchase-money or compensation to be paid to the plaintiffs for their interest in the whole of the manufactory called the Malkin's Bank Salt-works; or if the Company should have issued their warrant, pursuant to the notice of the 17th April 1848, that they might be restrained from attending before the jury, or in any manner proceeding under the warrant.

Further affidavits were filed by the plaintiffs and by the Company, the latter tending to shew that the brine-pit and reservoirs were not essential parts of the salt manufactory, and that other means of preserving the brine and of conveying it to the drying-house might easily be substituted for those then in use; that the brine-pit and reservoirs were in the nature of a store, and that that part of the premises only could be considered a manufactory, within the meaning of the 92nd section, in which the process of evaporation, by heat, of the watery particles of the brine, and crystallisation of the salt, was carried on.

June 8th. Notice of motion for the continuation of the former injunction, and for an injunction in the terms of the prayer of the supplemental bill, was then served on the Company, and the same now came on for hearing before Vice-Chancellor *Knight Bruce*.

Mr. *Russell* and Mr. *W. T. S. Daniel*, in support of the motion, contended, that, under the 92nd section(*a*) of the Lands Clauses Consolidation Act, the Company were bound, on the request of the plaintiffs, to take the whole of the manufactory.

Mr. *Malins* and Mr. *Bovill*, for the Company, contended, that the supplemental bill asked a totally different relief

(*a*) Sect. 92. "And be it enacted, that no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof."

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from that prayed by the original bill. The only object of that bill was, that the Company might be compelled to purchase all the land comprised in their original notice, and might be restrained from proceeding with their works in the meanwhile. That the Company had of their own accord done all that the original bill prayed, as fully as if the plaintiffs had obtained a decree; that the matter now introduced by supplemental bill was an entirely distinct relief; that the plaintiffs could not by supplemental bill make an entirely new case, and in this manner get a decree in their favour, which they could not have obtained in the original suit; that the 49th (*a*) section of the Lands Clauses Consolidation Act would give the plaintiffs all the compensation to which they were entitled; that, under that section, the question of disputed compensation was not confined to the value of the land itself, but included the amount of damage to lands, and therefore to messuages, tenements, and hereditaments, which was the extended sense given, by the interpretation clause of the act, to the word "lands;" that, under the 68th (*b*) section of the Railway Clauses

(*a*) See ante, p. 405.

(*b*) Sect. 68. "The company shall make, and at all times thereafter maintain, the following works, for the accommodation of the owners and occupiers of lands adjoining the railway, (that is to say), such and so many convenient gates, bridges, arches, culverts, and passages, over, under, or by the sides of or leading to or from the railway, as shall be necessary for the purpose of making good any interruption caused by the railway to the use of the lands through which the railway shall be made, and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof; also such arches, tunnels, culverts, drains, or other passages, either over or under, or by the sides of the railway, of such dimensions as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before making of the railway, or as nearly so as may be, and such works shall be made from time to time as the railway works proceed. Provided always, that the company shall not be required to make such accommodation works in such a manner as would pre-

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Consolidation Act, the Company were bound, if no compensation were given in respect thereof, to make and maintain certain works for the accommodation of the owners and occupiers of lands adjoining the railway, which works would necessarily include a culvert, or drain, from the brine-pit to the reservoirs. It was also contended, that the brine-pit would only be rendered a little smaller, and could be enlarged on the other side, and that it formed no part of the manufactory.

Mr. *Daniel* replied.

The VICE-CHANCELLOR.—The first question is, whether the plaintiffs have, by the course they have hitherto pursued, precluded themselves from taking advantage of the benefit of the 92nd section of the Lands Clauses Consolidation Act. I think they have not; and if they undertake, as they say they are willing to do, to abide by any order that the Court might make as to dissolving, discharging, or varying the injunction now in force, I grant the injunction, restraining the Company, until further order, from issuing their warrant for assessing the purchase-money or compensation to be paid by the Company for the plaintiffs' interest in the lands and hereditaments comprised in the notice to treat, and the plan delivered therewith, pursuant to the notice served by the Company. I do not think the injunction should go further.

Then comes the question, as to the 92nd section, whether what the Company propose to do is at variance with it? This is a serious question, and I think the Court is bound to protect the property in the meantime, until the opinion of a court of law on that point (which ought to

vent or obstruct the working or using of the railway, nor to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive and shall have been paid compensation, instead of the making them."

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be done as speedily as possible) can be taken. The plaintiffs are, in my opinion, bound to accede to some convenient mode, if the Company wish it, of taking the opinion of a court of law as to whether they are or not evading the 92nd section; the mode of proceeding must be considered. We have the authority of Lord *Eldon* for sending a mixed question of law and fact to an issue(*a*). I do not mean that this delay, in taking the opinion of a court of law, ought to interfere with the defendants' power of appealing, which arises, in my opinion, from this moment, when, in fact, they are restrained. The question to be decided is of this nature, whether the proceedings of the Company, in either of their forms, were intended to include any part of a manufactory, within the intent and meaning of the 92nd section?

In consequence of the counsel for the Company having expressed their determination to appeal, the Vice-Chancellor did not direct an issue.

From this decision the Company appealed, and they now moved to discharge the order of the Vice-Chancellor.

June 24th & 28th.

Mr. *Malins* and Mr. *Bovill* appeared, on behalf of the Company, to support the motion; and Mr. *J. Russell* and Mr. *Daniel* opposed it, on behalf of the plaintiffs.

The LORD CHANCELLOR.—I should have been glad if this case had been before me in such a shape as to enable me finally to decide the question between the parties, or to put it in a train for decision elsewhere; but I do not see how, as matters now stand, I can do this. If, indeed, I could see that the plaintiffs were precluded by the act of Parliament, and that they could not raise the question which has just been argued, (though I should be unwilling to come to such

(*a*) *Agar* v. *Regent's Canal Company*, Cooper, 77.

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a conclusion), I might now decide the case; but this is so far from being clear, that, though I give no opinion upon the point, I feel that I cannot, in its present position, dispose finally of the cause. It has been contended, that the plaintiffs, not having made their present claim within twenty-one days after the service of the notice, are now precluded; but I cannot decide this question on an application for an injunction. As the parties do not seem very willing to concur in any means for putting the question between them in a course of settlement, I must therefore deal with the case as it is now before me, according to the rules of the Court.

A party coming for an injunction is bound to come quickly after the discovery of his rights, and without having in any manner led the opposite party to suppose his case to be different from that which he really intends to make. In this case, it appears that the plaintiffs were fully aware of their rights, the Company having given their regular notice. The Company, on making certain deposits, became entitled to enter into possession of the land. They made their deposits and entered into possession. The bill was then filed. The Company having taken eight pieces of land only, the owner said to them, "You must take ten; having given notice of your intention to take ten, you shall not now depart from that proposal." This was the original contention, first before the Vice-Chancellor, and then before me. A party having made such a claim as this, cannot, as I have before intimated, go back from it, though he may not be absolutely bound by it: yet he may thus preclude himself from coming here for an injunction on other grounds. He has come to this Court, not perhaps saying he intends to ask for nothing but in respect of the ten pieces of land, but he has come raising only this point, that the Company having given notice to take ten, they cannot be allowed to take eight only. This proceeding of itself would deceive the Company; and it seems, from the cor-

respondence, that this was the sole question between the parties, the plaintiffs only claiming such damage as the Company would be bound to pay.

The plaintiffs knew of the claim which might be raised under the 92nd section of the act, and all the rights which it gave them; and yet they claim nothing but in respect of the ten pieces of land. Thus matters go on, until the question as to these ten pieces is decided in favour of the plaintiffs. The Company, then, having taken the ten pieces, and proceeded, according to the act, to summon a jury, the plaintiffs find out a new case, and that everything which has gone before is good for nothing. They say to the Company, "You shall not take any part of the ten pieces; you must take the whole works, these ten pieces being part of a manufactory."

A party having known his rights, and having had his claim in respect of them disposed of, if he then raises a new ground of equity, does not present his case in a form to entitle him to ask for the extraordinary interposition of this Court. A party might thus bring out his case by portions, instead of at once stating it; and to prevent this, and from a regard to the interest of suitors in this court, I should think it right to refuse to grant an injunction to a party seeking it in this manner.

But, again, when the evidence in this case is looked into, it all comes to this point—is the property in question, the reservoirs and brine-pit, part of the manufactory? This is a matter depending on the technical and professional meaning of the word "manufactory." In the affidavit filed before this question was raised, the opinion, that this property formed no part of the manufactory, is adopted by one of the plaintiffs, who speaks of "the property in question and the manufactory." This shews in what way it is spoken of generally; and the affidavit is the first affidavit of one of the plaintiffs; and the surveyor, who, though he does not swear to the part referred to, must yet have known it. The plaintiff, no doubt, swears differently, when the point is specially

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raised, and when the matter in contest might operate on his opinion. The Court will, however, under these circumstances, be disposed to take that testimony which he has given against himself. Independently of what the plaintiff has sworn, there is a body of evidence all one way, to the effect, that property like this is not generally understood to be part of the manufactory; and it is clear, that the 92nd section of the act is not intended to protect property not being part of a manufactory. There is no witness on the other side. Something was said about the expense of procuring professional evidence; but if parties choose to indulge in a litigation of this sort, they must be supposed to be able to do what is necessary for carrying it through. If, then, there were any considerations arising from the mode in which the plaintiffs have kept back their case, and it was only a question of fact on the evidence now before me, (which is all on one side), to the effect that the property which the Company intend to take is not part of the manufactory, I should do what I feel now bound to do, namely, dissolve this injunction.

The injunction granted on the supplemental bill was dissolved, with the costs of the motion before the Vice-Chancellor, the original injunction against the Company remaining in force.

A compromise was afterwards effected between the parties.

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BEFORE VICE-CHANCELLOR WIGRAM AND THE LORD CHANCELLOR.

HOLYOAKE *v.* THE SHREWSBURY AND BIRMINGHAM RAILWAY COMPANY.

July 20th, 21st, & 26th.

A Railway Company purchased a part of the plaintiff's land, the value being settled by arbitration. The Company entered, and were proceeding to make their line in a manner which clearly exceeded their powers of vertical deviation. The plaintiff filed his bill, alleging injury, and praying an injunction:—*Held*, by the Vice-Chancellor *Wigram*, that the plaintiff was entitled to an interim injunction, but ordered an action to be brought to try the legal right.

On appeal to the Lord Chancellor, he directed the action to be brought immediately, and directed the motion to stand over—*Held*, that a plaintiff ought to satisfy the Court that he has sustained substantial damage from the violation of a legal right, in order to entitle himself to an injunction.

THE plaintiff in this case was the owner of a mansion and lands situate at Donnington, in the county of Salop. The defendants, the Railway Company, proposed, in the year 1845, to carry their railway through certain closes belonging to the plaintiff, lying about three quarters of a mile from his mansion in which he resided.

It appeared by the evidence, and the plans deposited previously to the application to Parliament, that the proposed railway, proceeding from the westward, would, after passing a brook, enter and pass across three of the plaintiff's closes, and be carried by a viaduct eastward; it then left the plaintiff's land for one and a quarter furlong, and after crossing a public road leading to Tong, re-entered, and crossed three other closes of the plaintiff's land, distant about three quarters of a mile from his mansion. The plaintiff expressed his intention to oppose the defendants' bill in Parliament; but an arrangement was finally come to between the parties, which resulted in an agreement, dated the 3rd of July, 1846, by which, after reciting that the plaintiff had alleged that part of his property would be separated in an objectionable manner from other part of the estate, and that the estate generally would be greatly deteriorated in value, and the privacy of his mansion interfered with; but that he had consented to withdraw any opposition to the bill in Parliament in consequence of the agreement then come to, it was agreed, that the Company should carry so much of the

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railway as was intended to be made between the brook and the public road (hereinbefore mentioned), as far south from the plaintiff's residence as the limits of deviation would permit. That the amount to be paid by the Company for the land to be taken by them, and for severance, should be settled by arbitration; and the Company were not to dig or carry away any earth or soil, or other material from the plaintiff's land, except such as should be actually obtained in the execution of the works, without the plaintiff's consent. There was then a clause, that sufficient communication by bridges or archways should be made, and the question of sufficiency should be settled by arbitration, in the same manner as the amount of compensation to be paid to the plaintiff.

The bill passed into an act, and received the royal assent on the 3rd of August, 1846, and arbitrators having been appointed on both sides, an award was made in September, 1847, by which the sum of 2750*l.* was awarded to be paid for the land required by the Company, and for severance, and all injury that would be caused by the railway to the plaintiff's estate. The Company took possession of the land, and proceeded to make their railway as far south as the limits of deviation would permit, but in a manner by which they would transgress the limits of vertical deviation as referred to the common datum line.

By the evidence it appeared, that, at the point where the railway entered the plaintiff's land, the line, as then about to be constructed, would be a departure of two feet from the level over and above the five feet vertical deviation allowed by the act. And that, at the point where the railway was to have gone over the road, at an elevation of six feet, they now proposed, by lowering the level, that the railway should pass under the road seven feet six inches below the level of the road, which would cause an excess of vertical deviation of eight feet six inches.

In May, 1848, the plaintiff filed his bill, alleging, that the

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Company were constructing their line in a manner not within their powers, and that they were exceeding their limits of vertical deviation as referred to the common datum line of the railway.

The plaintiff, by his bill, stated, that he first became aware of the intention of the Company to deviate, in the month of April then last, by observing, that they were about to pass under the public road instead of crossing the road by a bridge, as they had originally proposed.

That the deviations from the proposed levels were very injurious to the estate of the plaintiff, and that, in particular, the altered method of raising the public road by carrying the same over instead of under the railway, was very inconvenient and unsightly; and further, that the works beyond the eastern extremity of the plaintiff's lands were being constructed in such a manner that a long and unsightly embankment would be raised to a height greatly exceeding what was permitted by the utmost allowed deviation of the level as referred to the datum line; and that the value and privacy of the plaintiff's residence would be greatly injured by such change of level.

That the height of the embankment, not on the plaintiff's land, was greatly increased by the excess of vertical deviation of that part of the line which crossed his lands.

The bill prayed an injunction to restrain the Company from deviating from the levels of the railway as referred to the common datum line, to any extent exceeding five feet in any place upon or within the lands belonging to the plaintiff, or in any place lying between the spot where the railway first entered the plaintiff's lands from the westward, and the spot where it left the said lands at the eastward, or in any other place within view of plaintiff's house; and that, in particular, the Company might be restrained from constructing their railway at a certain point therein mentioned, in such a manner that the level thereof would be lower than sixty feet from the original surface of the ground; and it

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prayed a similar injunction as to the point where the railway crossed the road; and, also, as to a certain other point therein mentioned.

The plaintiff moved, before the Vice-Chancellor *Wigram*, for an injunction, in the terms of the prayer of his bill.

Affidavits were filed on both sides; but it did not appear that the Company denied the allegations in the bill as to their exceeding the limits of vertical deviation.

Mr. *Wood* and Mr. *Erskine*, in support of the motion.

Mr. *Rolt* and Mr. *Cole*, contrà.

[The arguments of counsel are sufficiently stated in the judgment of the Vice-Chancellor.]

July 20th. On this day the VICE-CHANCELLOR said, that he considered this a case for an interim injunction, and he granted an interim injunction, and directed an action to be tried at the Shropshire Assizes.

On the following day

The VICE-CHANCELLOR—(after stating the facts of the case, delivered his judgment as follows).

The object of this suit is to restrain deviations, which the defendants admit are not authorised by their parliamentary powers. The question now before me is upon the interim injunction.

The defendants say, it is no injury to the plaintiff, but an advantage to him; and, if an injury, it is not an injury of such magnitude as this Court will protect by injunction. Secondly, they say the plaintiff has seen and observed, and acquiesced in the deviation throughout the process of the works, and, therefore, cannot now complain.

The answer the plaintiff makes to one part of the case is this: he says, the deviations from the proposed levels are very injurious to his estate, and that in particular, the

altered method of raising the public road by carrying the same over instead of under the railway, is very inconvenient and unsightly; and, further, that the works over the eastern extremity of the plaintiff's land are being now constructed in such a manner that a long and unsightly embankment will be raised in front of the plaintiff's house, to a height greatly exceeding what is permitted by the utmost allowed deviation of level as referred to the common datum line; and that the value and privacy of the plaintiff's residence will be greatly injured by such change of level.

Then with respect to the knowledge he has had, and his acquiescence, he positively denies having had any notice whatever that the Company were deviating from their level until the month of April, 1848.

The observations which the case gives rise to, or appears to me to call for, are few. It is not in dispute that the Company, throughout the plaintiff's lands, are exceeding their parliamentary powers; the onus, therefore, of justifying what they are now doing, is thrown wholly upon them. Their first proposition, that what they are doing is for the benefit of the plaintiff, does not appear to me to be admissible in this case. If the railway trains could be removed wholly out of sight, it probably might be justly asserted that they were promoting the plaintiff's object in that respect; but the benefit of a partial removal is extremely questionable—the plaintiff may decide that point for himself. Another material observation is, that the plaintiff, by the agreement, was to have bridges and other communications between the different parts of his land, which I intended to observe were not wholly connected, but separated by land belonging to other persons from each other. By the award he gives up these advantages, and has only one communication, that at the public road; and the effect of the departure from the levels has been to alter this communication. In point of fact, as it stood before, the road would have gone under the railway, being some feet above

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the present level of it. The effect of the deviation is, that there must be a bridge thrown over the railway, with a considerable ascent to its summit, which will be the only communication which the plaintiff will have from his lands on the north side, to his lands on the south side of the railway. If the deeper cutting more effectually hide the trains, that benefit may be set off against the alteration in the communication.

The next point made upon the evidence is, that the new levels have been adopted to meet the plaintiff's express wish that the trains may be kept out of sight; but I think it is perfectly clear, upon the evidence, that the deeper cutting has been made with the view to getting earth for the embankment, which the defendants propose to make instead of the viaduct.

As to the third point appearing upon the evidence, that the plaintiff must have seen and known from the beginning what the Company were doing, I must say that I cannot weigh the positive oath of the plaintiff with the inferences drawn by the witnesses. The case must be very clear in which such inferences can be relied on. It is extremely difficult to judge of the effect of levels by the eye; and when to this consideration is added, the deviation to the south, and the power of vertical deviation allowed by the act, I cannot say that the Company have fixed the plaintiff with any knowledge of their departure from the railway levels.

It clearly appears by the evidence, that the alteration in the levels had been determined on before the award was made; but that the arbitrators were not informed of it, and the award was made upon the hypothesis, that the parliamentary levels were to be observed. If the Company suffer any inconvenience from this, the cause lies with themselves, and they should not have departed from their parliamentary powers without licence, or, at all events, without an express notice of their intention, to the party whose lands they were upon.

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Upon the question, whether the damage is substantial or not, so as to entitle the plaintiff to restrain it eventually, of course, I shall not determine that until I know what a jury will say on the subject. The plaintiff must bring his action.

At the request of the plaintiff's counsel, and on their statement, that it would almost be impossible to be ready for trial at Shrewsbury on the 29th of that month, which was the commission-day at that place, his Honor directed the venue to be laid at Gloucester, where the commission-day would be on the 9th of August; the declaration to be delivered on the 25th of July then instant.

The Company then moved, by way of appeal, to discharge the order of the Court below, granting the injunction.

The plaintiff presented a cross motion by way of appeal from that part of the Vice-Chancellor's order which directed an action; and Mr. *Wood* and Mr. *Erskine* contended, that the plaintiff was entitled to his injunction without being put on terms, inasmuch as they had proved their case, that the defendants had exceeded their powers by constructing their line without their limits of vertical deviation: *Kemp* v. *The London and Brighton Railway Company* (*a*).

The LORD CHANCELLOR.—This case appears to me to turn entirely upon the extent of injury which the plaintiff has suffered, or may suffer, from the admitted departure of the Company from the levels of their railway, as referred to the datum line, beyond the powers which they had under their act. I cannot consider it at all as a case of contract. I cannot discover any contract in it; they have exceeded their powers. The question then is, whether the party complaining has suffered by such deviation by the Company beyond the powers of their act.

That is one question.

Another very important one, if it were necessary now to

(*a*) Ante, Vol. 1, p. 495.

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decide upon it, would be, how far, and, if the plaintiff had such a right, whether he has not lost the benefit of that right, as far as that objection is concerned, by the course he has adopted, since he did, or might have known, the course intended to be pursued by the Company. But the whole may depend on the first question; and the second may not arise, unless the plaintiff can make out he is substantially and really injured by the course adopted by the Company. The Vice-Chancellor was of that opinion, and directed a trial to take place, in an action brought by the party complaining against the Company for the damage sustained; but he acquiesced in the pressure from the plaintiff, that that trial might be deferred until the assizes for the county of Gloucester, which will not take place until a period in which the result of that trial cannot be a subject to be brought under my consideration until after the vacation.

Now, however willing the Court ought to be, (and nobody is more willing than I am), to exercise the powers of this Court to prevent these great companies from doing injuries to individuals, it is quite obvious that an equal measure of justice must be administered; that an individual shall not be permitted, by an injunction running over several months, to inflict the great injury which that injunction must do on a company who are restrained from carrying on works which are in progress, beyond what may be essentially necessary to administer justice between them and the parties who are complaining of their act.

It appears, fortunately, in this case, that I can have all the assistance which I think essentially necessary before I can dispose of the matter in equity, by the delay of a very few days; because it appears that this transaction is in Shropshire, and the assizes for that county take place—that is, the commission-day being Saturday, they take place the early part of next week. The pleadings in the action are now complete; the declaration has been delivered,

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and the defendants have pleaded to it: the plaintiff cannot complain that he is pressed, because he seems to have taken every moment of time he possibly could to prevent the possibility of the action being tried before a period which would give him the benefit of the injunction, in all probability, although not entitled to it, over the long vacation. I shall not, certainly, permit that to take place. It does not appear to me to be the least necessary, for the purpose of trying this question, that more than a week should be employed in doing all that remains to be done, namely, collecting the witnesses who are to be examined on one side or on the other. The assizes commencing on Saturday, that being the commission-day, the business cannot commence before Monday or Tuesday; probably a trial of this description will be on one of the later days, either Tuesday or Wednesday, in the next week. Under these circumstances, it appears the obvious course to be pursued is to vary this order so far as to direct the trial to take place at Shrewsbury, instead of taking place at Gloucester; the parties will, then, at the end of next week or the beginning of the week following, at all events during the present sittings, have an opportunity of bringing before me the result of the trial, and I shall then know better how to deal with it; and I shall then have ascertained, by the intervention of a jury, whether or not the plaintiff has sustained such substantial damage as I consider essential to enable him to support the application which is made to this Court. I am not satisfied at all that there is any possible difficulty in the parties being ready; one party may as well be ready as the other—there is no more hardship upon the one side than the other. And I cannot but think, that the struggling to get to Gloucester, instead of Shrewsbury, is a good deal influenced by the period of time that is fixed for the rising of this Court. It is quite obvious, if the trial takes place at Gloucester, except I hear anything about it during the vacation, which is not likely

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to take place, that there can be no good result from a trial in the county of Gloucester. I therefore propose now to direct, that the action shall be brought, or rather that the trial of that action which has been brought shall take place, at the Shrewsbury Assizes, and the remainder of the motion stand over until after that has taken place.

I mean to dispose of it aided by the result of the legal decision; and, as the action is so soon to come on, it would be an idle thing to dispose of the injunction on the other parts of the case until I know the result of that action. The Company, pending the trial and pending the injunction, will not think it expedient to go on spending money.

I require both parties to concur; and, if either party do not concur in having a trial at Shrewsbury, I shall deal with the injunction accordingly.

August 7th. The plaintiff not having proceeded to trial at Shrewsbury, the defendants now moved that the order for the interim injunction be dissolved, and that the plaintiff pay the costs of the motion.

The LORD CHANCELLOR ordered the plaintiff to pay the costs of the motion before the Vice-Chancellor; observing, that he had no right to come before the Court without ascertaining the damage. As to the costs of the plaintiff's appeal motion, his Lordship made no order, on the ground that he had varied the order of the Court below.

As to the principles which ought to regulate the exercise of the jurisdiction by injunction, see *Spottiswoode* v. *Clarke*, 2 Ph. 156.

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BEFORE THE VICE-CHANCELLOR OF ENGLAND.

Ex parte BOUVERIE.

August 2nd.

Under the construction of the 69th section of the Lands Clauses Consolidation Act, a purchase made and completed previous to a reference to the Master will not, although it be afterwards approved by the Master, be a purchase within the meaning of the act, so as to entitle the petitioner to his costs.

THIS was a petition praying the confirmation of the Master's report, whereby he had found that a certain proposed purchase was a fit and proper investment of monies paid into court by a Railway Company, to be laid out in the purchase of other lands to be settled to the like uses as those taken by the Company, and praying the costs, according to the act.

It appeared that the lands in question had been purchased by the trustees of the settlement previously to the reference to the Master, and the money paid and the conveyance executed.

Mr. *Craig*, for the petitioner.

Mr. *Speed*, for the Company, objected, that, under the circumstances of this case and the true construction of the act (*a*), the Company were not liable for the costs of the purchase.

The VICE-CHANCELLOR was of opinion, that, as the purchase and conveyance had been completed before the reference to the Master was made, the proposed purchase did not come within the terms of the 69th section, and he refused to give the petitioner his costs of the purchase, but in other respects made the order as prayed.

(*a*) Northampton and Peterborough Railway Act, 6 & 7 Vict. c. lxiv, which provides for the payment of costs in the same terms as the 82nd section of the Lands Clauses Consolidation Act.

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BEFORE THE VICE-CHANCELLOR OF ENGLAND.

August 2nd. *Ex parte* BRADSHAW, *Re* THE EAST AND WEST INDIA DOCKS AND BIRMINGHAM JUNCTION RAILWAY ACT, AND THE LANDS CLAUSES CONSOLIDATION ACT.

A petition was presented by a landowner, praying that a sum of money deposited in Court for the purchase of certain lands taken by a Railway Company, might be paid out to him, and that the costs of that application, and of conveyance, and of furnishing abstracts of title, &c., might be paid to him by the Company.

The Company opposed that part of the prayer which asked for costs, on the ground that the petitioner had wilfully refused to receive the sum found by an award to be the value of the land, when tendered to him, and had neglected to make out his title when required by the Company so to do.

THIS was a petition presented by the owner in fee-simple of certain lands taken by the above-named Company, under the powers of their act; and it stated that in November, 1846, the petitioner received a notice from the Company in the usual form, calling on him for the particulars of his estate and interest, whereupon he sent in his claim, and signified his desire to have his said claim settled by arbitration. Both parties then appointed their respective arbitrators, but as they could not concur in the appointment of an umpire, one was appointed by the Board of Trade.

The umpire made his award, dated the 23rd July, 1847, by which the value of the land was awarded to be 875*l.* That the petitioner conscientiously believing that the said award was invalid in point of law, applied to the Court of Queen's Bench to set aside the same, and on the 17th Nov. 1847, it was ordered by the said Court of Queen's Bench that the said Company, upon notice of that rule to be given to their secretary, should upon the 23rd November then instant shew cause why the said award of umpireage should not be set aside on the grounds therein mentioned, and that in the meantime proceedings should be stayed. That the said rule was afterwards enlarged, and on the 4th May, 1848, petitioner's objections against the said award or um-

The petitioner having stated by affidavit that he conscientiously believed the award to be invalid, and that the question had been argued and decided at law after a long argument—*Held*, that such a refusal was not a "wilful" refusal within the meaning of the 80th section of the Lands Clauses Consolidation Act.

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pireage were argued at great length before the said Court of Queen's Bench, and at the conclusion of such argument the Court took time to consider their judgment. That on the 2nd June following the said Court discharged the rule.

That the petitioner had incurred certain costs, charges, and expenses in making out and furnishing such abstracts as the Company required, and otherwise in or about or incident to the investigation, deduction, and verification of his title to the lands and premises taken by the Company.

The foregoing facts were verified by affidavit. The petition then prayed that the sum of 875*l.* might be paid out of court to the petitioner, and that it might be referred to the Master to tax the petitioner's costs incident to the petition and the order and other proceedings relating thereto or consequent thereon, and also his costs, charges, and expenses, of and incident to all conveyances and assurances of the said lands, so purchased or taken by the Company, and of any outstanding terms or interests therein, and of deducing, evidencing, and verifying the title to such lands, &c.; and of making out and furnishing such abstracts and attested copies, as the Company had required or might require, and all other reasonable expenses incident to the investigation, deduction, and verification of such title, and that such costs, when taxed, might be paid.

An affidavit was filed by the solicitor of the Company, stating that he had, after notice, attended the solicitor of the petitioner and tendered to him the sum of 875*l.*, and called upon and required him to produce the title of the petitioner to the hereditaments mentioned in the award; but the petitioner's solicitor refused to accept the said sum, and at the same time declined and failed to make out the petitioner's title.

The Company then proceeded to execute a deed-poll, in the form prescribed by the 75th section, by which the right and interest of the petitioner in the land in question vested

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in the Company. Under the 76th section (*a*) of the Lands Clauses Act, the Company paid the sum awarded into court to the credit of the petitioner. An affidavit was filed by the Company, in opposition to the case stated by the petitioner, by which it was deposed, that the purchase-money was tendered by the Company to the solicitor of the petitioner, and "that he refused to accept the same, and at the same time declined to make out the title of the petitioner to the said hereditaments or any part thereof."

The question arising on this petition was, whether the refusal by the petitioner was a wilful refusal, within the meaning of the 80th section (*b*) of the Lands Clauses Consolidated Act, so as to disentitle him to any costs.

(*a*) Sect. 76. If the owner of any such lands, purchased or taken by the promoters of the undertaking, or of any interest therein, on tender of the purchase-money or compensation, either agreed or awarded to be paid in respect thereof, refuse to accept the same, or neglect or fail to make out a title to such lands, or to the interest therein, claimed by him, to the satisfaction of the promoters of the undertaking; or if he refuse to convey or release such lands, as directed by the promoters of the undertaking; or if any such owner be absent from the kingdom, or cannot, after diligent inquiry, be found, or fail to appear, in the inquiry, before a jury, as herein provided for, it shall be lawful for the promoters of the undertaking to deposit the purchase-money or compensation, payable in respect of such lands, or of any interest therein, in the Bank, in the name and with the privity of the Accountant-General of the Court of Chancery in England, to be placed, except in the cases herein otherwise provided for, to his account there, to the credit of the parties interested in such lands (describing them, so far as the promoters of the undertaking can do), subject to the control and disposition of the said Court.

(*b*) Sect. 80. In all cases of monies deposited in the Bank, under the provisions of this or the special act, or any act incorporated therewith, except where such monies shall have been so deposited by reason of the wilful refusal of any party entitled thereto, to receive the same, or to convey or release the lands in respect whereof the same shall be payable; or by reason of the wilful neglect of any party to make out a good title to the land required, it shall be lawful for

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Mr. *Bethell*, and Mr. *Sheffield*, in support of the petition, contended, that the objection to the award was not a frivolous one, and that the very fact of the petitioner having taken the opinion of a court of law upon it, shewed that he had, at the time of refusing, what he supposed to be a reasonable ground for objecting.

Mr. *Lloyd*, for the Company, contended, that the question was, whether a party who chooses to take a mere formal objection to an award, and to go to law about it, in order to throw expense on the Company, does not, in fact, wilfully refuse to accept the purchase-money, within the 76th and 80th sections of the Consolidated Act. That, at all events, the petitioner was not entitled to his costs of conveyance, as the Company had, in consequence of the refusal of the petitioner, availed themselves of the summary

the Court of Chancery in England, to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking; (that is to say,) the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such costs as are herein otherwise provided for; and the cost of the investment of such monies in government or real securities, and of the re-investment thereof in the purchase of other land; and also the costs of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such monies shall be invested, and for the payment out of court of the principal of such monies, or of the securities wherein the same shall be invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants: provided always, that the costs of one application only for re-investment in land shall be allowed, unless it shall appear to the Court of Chancery in England, and the Court of Exchequer in Ireland, that it is for the benefit of the parties interested in the said monies that the same should be invested in the purchase of lands, in different sums and at different times; in which case it shall be lawful for the Court, if it think fit, to order the costs of any such investments to be paid by the promoters of the undertaking.

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mode prescribed by the act; and that the petitioner must defray any expense he had incurred, having, by his own conduct, rendered such expense of no service to the Company.

Mr. *Bethell*, in his reply, argued, that it was discretionary in the Court, under the act, to allow the petitioner his costs, except in cases where the refusal was wilful. In this case there was a grave question, whether the award was or was not valid; and it would be as unjust to deprive the petitioner of the benefits given to him by the act, as to fix a trustee with costs who refuses to transfer in a case where a question is raised as to the right of the parties to receive the funds.

The VICE-CHANCELLOR.—The question arises on the words "wilful refusal;" and it appears to me, that the Legislature meant to distinguish between a refusal prompted by reason, and one which was the act of the will, without the exercise of reason. Now, as to this case, the petitioner states, in his affidavit, that, "conscientiously believing that the award was invalid in point of law, he applied to the Court," &c. It appears to me, that this statement affords pregnant evidence that the refusal was not wilful—not mere obstinacy; but that there was a question of such a nature that it required an argument, which is designated as "of great length," and that the Court took time to consider. I cannot consider this a captious objection; and I, therefore, consider that, upon the true construction of these clauses, the refusal was not, in the present instance, such a wilful refusal as to disentitle the petitioner to his costs.

The order was then made, as prayed.

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March 4th & Dec. 21st.

A railway Company, after fruitless negotiations with a landowner, deposited the value and entered into possession of his land. The price was afterwards settled by arbitration, and paid by the Company, who then applied by petition to have the sum deposited in court paid out to them. The landowner claimed a lien on the deposit, for his costs of negotiation and conveyance:—*Held*, by the Lord Chancellor, discharging the order of the Vice-Chancellor of England, that he was not entitled to such lien, and the order was made as prayed by the petition.

THIS was a petition presented by the above-mentioned Company, praying the payment out of court to them of a sum of money which had been deposited there, pending an arbitration as to the value of certain hereditaments taken under the powers of their act.

It appeared from the statements contained in the petition, that Jane Stevens was interested in certain lands required by the Company for the purposes of their act, and that divers negotiations were entered into between the Railway Company and the said Jane Stevens, for the purchase of her interest, but the parties could not agree upon the sum to be paid as the value.

The Railway Company, under the powers conferred on them by the 85th section of the Lands Clauses Consolidation Act, deposited the estimated value (235*l.*) in court, delivered a bond (*a*), and entered upon the hereditaments in question.

The value was afterwards ascertained by arbitration, and the sum awarded, with interest, was paid to Jane Stevens by the Company.

The solicitor of Jane Stevens, on her behalf, delivered a bill to the Company, whereby he claimed the sum of 53*l.* as the costs of the negotiations with the Company, and 8*l.* as the costs of making out the abstract and of the conveyance.

The Company referred the bill for taxation, when the

(*a*) This bond was in the usual form, and followed the words of the 85th section of the Lands Clauses Consolidation Act, and made no mention of costs.

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taxing Master decided that the vendor was not entitled to her costs under the 80th section of the Lands Clauses Consolidation Act, but only to those given by the 83rd section of that act, observing—that the deposit referred to in the 80th section was the deposit of the purchase-money for the purpose of its being administered by the Court according to the trusts on which the lands were held, the deposit in the case before him being made under the subsequent provisions of the act, and for security only, pending the treaty for the completion of the purchase; that when the purchase was completed, the money was to be repaid to the Company; and a provision was made for any costs relating to the deposit, but the vendor was left to get his other costs under the 83rd section, which provided for the case of land not held in trust, but which parties were capable to treat for and sell in the ordinary way. That in such cases the act gave to the vendor the costs of shewing his title and executing his conveyance, but not the costs of his bargain and agreement for sale; and the Master was therefore of opinion that the bill must begin with the item for preparing the abstracts.

Mr. *Stuart* and Mr. *J. H. Law*, for the petitioners, contended that the Court had no jurisdiction in the present case over the fund, except to order it to be repaid to the promoters of the undertaking, under the 87th section of the act referred to. All the conditions had been fully performed by the Company, and the vendor had no lien on the money in court for the costs. The proceedings by the Company were entirely *ex parte*, and the vendor need not have incurred any costs: *Bridges* v. *The Wilts, Somerset, and Weymouth Railway Company* (*a*).

Mr. *Bethell* and Mr. *Taylor*, contrà, contended, that

(*a*) Ante, Vol. 4, p. 623.

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the words of the 80th section, whereby the Court had the power "to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking, that is to say, the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof," clearly enabled the Court to give the present vendor the costs incurred in the negotiations with the Company, as well as the costs of the conveyance.

Mr. *Stuart* replied.

The VICE-CHANCELLOR:—

Taking the two sections together, it certainly appears to me that this particular case is not in terms provided for by them, but since the language of the act is so general, I think it may be applied to monies deposited in consequence of such proceedings as have taken place in the present instance, viz. where the parties have disputed as to the price, a bond has been given, and an arbitration has taken place. [His Honor having referred to the 80th section, proceeded as follows]:—Now, *primâ facie*, it appears that if any costs, such as are mentioned in this section, have been incurred, they ought, notwithstanding the 87th section makes no mention of them, to be first paid. That section does not make it imperative on the Court to direct that in all events the whole deposit shall be paid over; but if the Court has any reason to think that something has passed between the landholder and the Company, which makes it right that something should be paid by them for costs, the Court can exercise its discretion. They who ask equity should also do equity; and if this Company come here to ask for the payment to them of their deposit, they should first pay what is due from them to the landowner.

A reference was accordingly directed to the Master to inquire whether any, and what costs, including therein all

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reasonable charges and expenses incident to the purchase or taking of the messuage and premises in the petition mentioned, or which had been incurred in consequence thereof, then remained due.

From this order the Company appealed.

Mr. *Stuart* and Mr. *Law*, for the Company, cited *Ex parte The Great Northern Railway Company* (*a*), and contended, that that was a much stronger case than the present, inasmuch as there was an affidavit of costs remaining unpaid.

The Solicitor-General and Mr. *Taylor* contended, that the costs which were included in *Ex parte The Great Northern Railway Company*, were the costs of the jury, of the conveyance, and of the suit, the two former being costs specially provided for by the act, and the latter being the costs of a suit which, not having been heard by the Vice-Chancellor of England, were not within his jurisdiction, but must be determined by the Judge before whom the cause was heard.

The LORD CHANCELLOR.—This case is stated to be one of great hardship, and it has been urged that parties must frequently incur expenses in negotiations and dealings with these companies, which they have no means of recovering except by the interference of the Court, at the time when the Company make an application to have the money deposited by them paid out.

I have not now to decide whether the respondent is entitled to any costs against the Company, or, if she be, what is her remedy; but merely whether she is entitled to such costs out of this fund. She is no doubt entitled to have her costs paid; but if the act is insufficient to give the power to declare a lien on the fund in court, I cannot help it, and I am bound by the provisions of the act, under which a cer-

(*a*) Ante, p. 269.

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tain machinery is provided. No case has been made out that the condition of the bond has not been complied with, and I must order the payment of the money deposited to the Company. The words of the 87th section are, "Upon the condition of such bond being fully performed, it shall be lawful for the Court of Chancery in England, upon a like application, to order the money so deposited, or the funds in which the same shall have been invested, together with the accumulation thereof, to be repaid or transferred to the promoters of the undertaking."

The Company have performed the condition of the bond, and they now come as a matter of course, asking, that the money deposited be repaid to them. It would be quite against the directions of the act if I were to refuse this application. No question has been raised before me on the construction of the 87th section, and the whole contest is, Is this money to be paid, or is it to be stayed because, as it is alleged, certain costs have been incurred by parties dealing with the Company, which the Company are bound to pay? Unless such costs are, by the words of the act, declared to be a lien on the fund in Court, the Court must comply with the prayer of the petitioners; the only question being, whether they have satisfied the condition of the bond, so as to be entitled to their money. It appears to me that they have, and I consider the reference directed by the Vice-Chancellor was wrong.

His Lordship then made the order as prayed, without prejudice to any proceedings the respondent might think proper to adopt with respect to her costs.

The counsel for the petitioners then submitted that they ought not to pay the respondent's costs in the Court below.

The LORD CHANCELLOR.—A party served with a petition does not lose his costs by raising a claim unsuccessfully at the hearing.

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Nov. 3rd & 16th.

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By an old act of Parliament giving a Company power to make a canal, it was provided, that nothing therein contained should affect the right of the owners of land to the mines and minerals lying within or under the lands to be made use of for the canal, and it should be lawful for such owners to work such mines, not thereby injuring, prejudicing, or obstructing the canal. And, further, that, if the owner or worker of any coal or mine should, in pursuing such mine work near or under the canal, so as, in the opinion of the Company, to endanger or damage the same, or in the opinion of the owner or worker of the mine, to endanger or damage the further working thereof, then it should be lawful for the Company to treat and agree with the owner; and in case of disagreement, certain commissioners were appointed to assess the amount of compensation.

ON the 3rd of April, 1848, the Vice-Chancellor granted an injunction, restraining the defendants, Cutts and Lee, (trustees for Royston, another of the defendants), from taking any steps or proceeding to have the amount of compensation for coal, claimed by a certain notice, dated the 13th of March, 1848, settled by arbitration, or in any other manner; and from taking any steps or proceedings to enforce payment of any compensation for coal so claimed, or any part of such compensation, from the Cromford Canal Company.

On the 3rd of November following, the two defendants moved, before the Vice-Chancellor of England, to dissolve the injunction. The facts stated by the bill on which the injunction was granted, were, that an act passed, (29 Geo. 3, c. lxxiv.), incorporating the Cromford Canal Company; and, by the 19th section of that act, certain persons were appointed for settling, determining, and adjusting all ques-

The commissioners never having exercised their powers, it was thought expedient, for more easily settling claims for compensation, to incorporate the Lands Clauses Consolidation Act with the Canal Act, and an act was passed for that purpose.

The defendants, in working their mine, approached so near as, in their opinion, to endanger the canal, and negotiations were commenced between the plaintiffs and the defendants as to the coals necessary to be left, but no terms were agreed on.

The defendants then gave notice of their intention to proceed to arbitration, under the Lands Clauses Consolidation Act, whereupon the Company filed their bill, and applied for an injunction:—*Held*, by the Lord Chancellor, discharging the order for an injunction granted by the Vice-Chancellor of England, that the defendants were justified in proceeding before the proper tribunal, to ascertain how much compensation they were entitled to.

Semble, that a court of equity has jurisdiction, if it be satisfied that no injury will ensue from working the coal, to restrain a party from proceeding to arbitration under their act.

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tions, matters, and differences, which should or might arise between the Cromford Canal Company and the several proprietors of and persons interested in any lands that should or might be affected by the execution of the powers thereby granted; and, by the 26th section, powers were vested in such commissioners to determine the amount of damages by consent, and, if parties could not agree, then to summon a jury for that purpose; and, by the 28th section, it was enacted, that the commissioners should not be obliged to receive and take notice of any complaint to be made by any person for damage or injury, unless application had been made to the Canal Company, or their clerk or treasurer, within six months after such supposed injury or damage should have been sustained. The 34th section was as follows: "That nothing herein contained shall extend to defeat, prejudice, or affect the right of any lord or lords of any manor or manors, or of any owner or owners of any lands or grounds, in, upon, or through which the said intended canal and collateral cut, or either of them, or any towing-paths, wharfs, quays, trenches, sluices, passages, watercourses, or conveniences aforesaid, shall be made to the mines and minerals lying and being within or under the lands or grounds to be set out or made use of for such towing-paths, wharfs, quays, trenches, sluices, passages, or watercourses, or other conveniences aforesaid, or any of them; but all such mines and minerals are hereby reserved to such lord or lords of such manor or manors, and to such owner or owners of such lands or grounds respectively, their heirs, executors, administrators, and assigns respectively; and it shall be lawful for the lord or lords of such manor or manors, or such owner or owners of such lands or grounds respectively, (subject to the conditions and restrictions herein contained), to work, get, drain, take, and carry away, to his, her, or their own use, such mines and minerals, not thereby injuring, prejudicing, or obstructing the said intended canal and collateral cut, towing-paths, wharfs, quays,

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trenches, sluices, passages, watercourses, or other the conveniences aforesaid, or any of them, anything herein contained to the contrary notwithstanding." Sect. 35: "Provided, that, if the owner or worker, or owners or workers, of any coal or other mine or mines, shall, in pursuing such mine or mines, work near or under the said intended canal and collateral cut, or either of them, so as, in the opinion of the said Cromford Canal Company, to endanger or damage the same, or, in the opinion of the said owner or worker, owners or workers, of the said mine or mines, to endanger or damage the further working thereof, then it shall be lawful for the said Cromford Canal Company to treat and agree with the owner or worker, or owners or workers, for all such coals or other minerals as may be near or under the said intended canal and collateral cut, or either of them, as shall be thought proper to be left for the security or preservation of the said intended canal and collateral cut, or either of them, or mine or mines as aforesaid; and in case the said Cromford Canal Company, and such owner or worker, or owners or workers, of such mine or mines, shall disagree in the satisfaction to be made for such coal or other mineral, then it shall be lawful for the said commissioners, at the request of the said Cromford Canal Company, or of such owner or worker, owners or workers, of such mine or mines, to cause a jury to be summoned and impanelled, in the manner hereinbefore directed, who shall, and they are hereby authorised and required, by such ways and means as aforesaid, to assess and determine what satisfaction such owner or worker, owners or workers, of such mine or mines ought to have and receive from the said Cromford Canal Company, on being restrained from working such mine or mines; and, upon payment or satisfaction made to such owner or worker, owners or workers, of such mine or mines, by the said Cromford Canal Company, according to the verdict or judgment of such jury, such owner or worker, owners or workers, of such mine or mines, shall

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be and they are hereby perpetually restrained from working such mine or mines within the limits for which satisfaction shall by the said jury be adjudged and declared to extend."

That, shortly after the passing of the act, the canal was completed.

That another act of Parliament was passed, (8 & 9 Vict. c. clxxiv.), to amend the original act, which, after reciting the appointment of commissioners, and that they did not meet to carry the provisions of the act into execution, by reason whereof no tribunal then existed, or could be legally constituted, for settling or determining any question or matter between the proprietors of lands, &c., and the Company; and also reciting that claims for compensation were then pending; it was, by the second section, enacted, that the Lands Clauses Consolidation Act should be incorporated with and form part of that act, (except only as regarded such of the provisions of the same act as might not in any way relate to or concern the settling, determining, or adjusting the questions, matters, and differences, which then existed or might arise between the said Canal Company and the several proprietors of and persons interested in any lands, &c., or the rights or remedies of the several parties in that behalf interested respectively, or any of them), and should have such construction and effect as should best enable such questions, matters, and differences, to be respectively settled, determined, and adjusted.

The bill then went on to state, that, at the request of the defendant Royston, Mr. P. (a person in the employment of the Company, but not their clerk) took upon himself, without any authority from the Company, to request Mr. A., a surveyor and coal valuer, to inspect that part of the canal under which the said defendant proposed to leave his coal unworked. That, accordingly, Mr. A. did, but without any authority for that purpose, make an inspection and communication with the defendant Royston, and a plan was submitted by him to Mr. A., on which Mr. A. marked the

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portion of coal which he considered it desirable to leave under the canal.

It was stated by the bill, that the correspondence and proceedings between Royston, Mr. P., and Mr. A., were entirely without the privity, knowledge of, or any authority from the Company, or their clerk; and that the matter was first brought under the notice and cognizance of the complainants by a letter, in March, 1843, addressed to the solicitor of the Company by Royston's solicitor, which letter was as follows:—

"DEAR SIR,—Six weeks ago I had a correspondence with Mr. A., on behalf of the Canal Company, as to the value of the three acres of coal lying under the canal in Codnor Park, and belonging to my client, which he stated were necessarily wanted by the Company, as a protection to the canal. I sent him Mr. W.'s estimate of my client's claim, and not having any reply since, I beg an answer from you, as their official organ, whether they will pay the demand (2109*l.* 11*s.* 6*d*), or whether my client must resort to legal proceedings, for he is prevented from getting the coal solely by the consequences which would happen to the canal were he to do so."

That the solicitor for the plaintiffs, upon receipt of the last-mentioned letter, brought it before the committee of the Company; and the committee having considered the same letter and matter, directed Messrs. Percy & Company to write; and they did accordingly write to Royston's solicitor, as follows:—"In reply to your letter, we beg to inform you, that the price asked by Mr. Royston for the coal in Codnor Park is considered by the Cromford Canal Company to be so extravagant in amount, and so far to exceed what they are advised is the value, that we are directed by the Committee to decline purchasing the same; and also to apprise you, that your client is at liberty to get the coal, if he thinks proper."

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Some further communications took place between the parties; and the Cromford Canal Company having declined to purchase the coal, on the 13th of October, 1847, a notice was served on the Company, on behalf of the defendant Royston, to the following effect:—"Take notice, that, in consequence of notice given in the year 1842, by your agent, Mr. P., to J. C. Royston, not to get the coal under or within a certain distance of your canal, but to leave the same for the security or preservation of the said canal, the said J. C. Royston, although, at the time of receiving such notice, was getting his coal contiguous to your canal, and but for such notice would have gotten the coal under the said canal in due course of workmanship, and has abstained from getting the same," &c. The notice then set forth the particulars of claim, amounting to 2109*l.* 11*s.* 6*d.*, and the willingness of the parties to treat; and it then stated, that, unless the claims were satisfied or discharged, or the parties could agree, that J. Cutts and Thomas Lee, (two of the defendants, to whom the defendant Royston had conveyed the legal estate of the lands, &c. in question), would, by virtue of the powers of the Lands Clauses Consolidation Act, incorporated in the Canal Act, proceed to arbitration; and they thereby nominated A. B. as arbitrator on their behalves.

The solicitors of the Company by letter stated, that they would submit the defendant's claim to the committee of the Company, in order to receive their instructions on the subject, and then proceeded as follows: "But we think it necessary and proper to warn you that the Company will rely upon the acts of Parliament for any injury that may be done to their canal and works;" and in a subsequent letter they stated that their instructions had always been to impose no restriction whatever on Mr. Royston getting his coal in a proper and workmanlike manner. The bill, after charging that Mr. P. and the surveyor had acted without any authority from the Company, prayed that it might

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be declared that the defendants had not any right or claim whatsoever to be compensated for or in respect of any coal formerly the property of J. C. Royston, situate, lying, and being under any part or parts of the Cromford Canal, or the neighbourhood thereof, the property of the Company, and for or in respect of which, compensation is claimed by the notice of the 13th March, 1846; and the bill then prayed an injunction in the form granted by the Vice-Chancellor of England.

The answer of the defendants, Cutts and Lee, was to the effect, that the proceedings of Mr. P. and the surveyor were the acts of the Company. That they had been obliged to desist from working the coal on account of the danger to the canal, and that in fact it was not possible to get any part of the coal remaining ungotten without very materially injuring and damaging, or endangering the canal and works, and that the same was necessary to be left for the security and preservation thereof.

The answer did not, however, state that the defendants apprehended any injury or danger to the mine from the canal.

On the 3rd April, the plaintiffs moved for an injunction upon notice, and the defendants not appearing, it issued accordingly.

On the 3rd November, the defendants, by their counsel, Mr. *Stuart* and Mr. *Follett*, moved to dissolve the injunction.

The VICE-CHANCELLOR—[without hearing Mr. *J. Parker* and Mr. *Metcalfe*, who appeared in support of the injunction]—The injunction, as I understand it, is to restrain the defendants, Cutts and Lee, from proceeding under an authority supposed to be conferred by the Lands Clauses Act, which act has been incorporated into the act of the 8th & 9th of Vict., amending the original act of the 29th of Geo. 3. Now the general state of the case is this, that under the act of

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the 29th of Geo. 3, certain persons were formed into a company, that is, a corporation, and they were authorised to make a canal in a given manner; and I observe that there are, so far as I can collect, provisions in the act which authorise compensation to be given by the Company to the owners, and so on, with whom the Company might have to deal for the lands upon which they might have to enter for the purpose of making the canal; and it is an admitted fact, that the canal has long been made and completed. Then I observe, that by the 34th section it is provided, that nothing contained in the act "shall extend to defeat or prejudice, or affect the right of any lord or lords of manors," and so on, in, upon, or through which the canal shall be made, to the mines and minerals which lie under the manors or lands; "and it shall be lawful for the lords of manors and the owners of lands," and so on, to work the mines, not thereby injuring, prejudicing, or obstructing the intended canal.

It appears to me, therefore, that the legitimate effect of the act of Parliament is this: to have vested in the Company, the canal and all such parts of any lands taken for the purpose of making the canal, as should be necessary for the preservation of the canal; and that, if the canal passes over coals, the lords and the owners of the coals may work the coals, not, however, thereby prejudicing the canal. I admit this may raise questions, one of which may be, how far a certain act done by a lord of the manor for the purpose of getting his coal under or by the side of the canal is prejudicial to the canal; but provided lords of manors can work the coals which are under the canal without injuring the canal, it appears to me they are at full liberty so to do. So far, however, as the coals under the canal may be absolutely necessary to be preserved in the state in which they originally were, for the preservation of the canal, it appears to me, either the fee-simple of the coals is vested in the corporation, or at any rate all right of the lord or former owner of the coals to work them is taken away.

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Now, that being the state of the case, the act of the 8th & 9th of Vict. was passed, which, taking notice that there had been in effect a total cessation, if I may use the expression, of the powers of the parliamentary arbitrators appointed under the original act, and reciting that certain claims for compensation under the first recited act were preferred against the Canal Company, "and are now pending, and the same cannot be determined by reason of the default so apprehended, and believed to have been made as aforesaid." Then it is enacted, that certain provisions shall be dealt with as the act provides; and then, by the second section, "That, for the purpose of enabling all questions, matters, and differences, which now exist, or shall or may arise between the Cromford Canal Company and the proprietors of lands," it is enacted, "That the Lands Clauses Consolidation Act, 1845, shall be incorporated with, and form part of this act;" and then there is this exception: ("Except only as regards such of the provisions of the same act as may not in any way relate to or concern the settling, determining, or adjusting of such questions, matters, and differences respectively, or the rights or remedies of the several parties in that behalf interested respectively, or any of them;) and shall have such construction and effect as shall best enable such questions, matters, and differences, to be respectively settled, determined, and adjusted, according to the true intent of the said recited acts, and this act respectively." Then, when you look to the Lands Clauses Consolidation Act, and turn to this particular section, which is supposed to bear precisely on the case, you find it couched in this language: that, "if any party shall be entitled to any compensation in respect of any lands, or of any interest therein which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act;" "And if such party shall desire to have the same settled by arbitration, it

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shall be lawful for him to give notice in writing to the promoters;" and so on, in a particular manner specified.

Now, just observe how it stands. It is impossible not to assume, even if there were no express allegation, but that such compensation as was fit and right to be made in respect of the original formation of the canal over the coal mine in question has been paid and settled. I take it for granted, from the length of time that that has been established, that nothing is due in respect of the original formation of the canal over the coal in question; but it stands in this manner, that, by the effect of making the canal under the act of the 29th of Geo. 3, the Company have a clear right to the possession of their canal complete, so as they shall not be injuriously affected by any lord or owner of coals working the coals to the prejudice of the canal. He may work his coal as he pleases, provided he does no prejudice to the canal. Has a case arisen here, in which it can be said that the 68th section of the Lands Clauses Act, which refers to the case of a party being entitled to any compensation in respect of lands, or any interest therein, which shall have been taken, or injuriously affected by the execution of works, or the making the canal, applies? It appears to me that the case provided for by the Lands Clauses Act is just the converse of that for which the defendant is contending. If it was intended by the Company to do any injury, then I admit the 68th section would apply; but it is not intended by the Company to do anything but this, as I understand it—that the lord of the manor himself wishes, in effect, to do the injury, that is, to work his coals, and uses a species of threat which, although not expressed, is necessarily implied; for, the act of working the coal creates a fear in the Company that they may be under the necessity of purchasing the coals in order to free themselves from any injury which may arise by any act of the owner of the coal; whereas the Company only require to be as they have been for a great number of years, namely, in quiet and undis-

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turbed possession of their canal, without any injury to be done to them by any act of the owner of the coals.

It appears to me, that this is a case in which the provisions of the act of the 8th & 9th of Vict., which amended the Canal Act, including as part of its provisions those of the Lands Clauses Act, really does not apply, and I apprehend it is now the settled jurisdiction of this Court, that parties have no right to proceed under the Lands Clauses Act, or the Railways Clauses Act, and so on, or to take on themselves to deal in any other way than that which the acts have particularly pointed out; and if a case arises in which you find that a party, under pretext of proceeding according to the provisions of the Lands Clauses Act, is really not so proceeding at all, I apprehend that the Court has as much a right, according to the principles of former decisions, to restrain the proceedings under the Lands Clauses Act, with regard to a jury or any other, as it has a right, which it has repeatedly exercised, of preventing a party from proceeding on a notice to take lands. And that being my opinion, I cannot help thinking this injunction ought not to be dissolved, and I must refuse this motion, with costs.

Nov. 16*th.*

The defendants now renewed their motion to dissolve, by way of appeal, from the decisions of the Vice-Chancellor.

Mr. *Stuart* and Mr. *Follett*, for the appellants, contended, that the 34th and 35th clauses of the original act gave the proprietors of coal a right to compensation in two cases—where injury was likely to result to the canal—or where injury was likely to result to the mine. That the time for claiming such compensation was not limited, but the provisions of the act were prospective, and came into operation whenever the injury was, in the opinion of either party, likely to arise; that time was clearly not confined to the

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completion of the canal. The machinery for obtaining compensation under the original act having failed, the act of the Queen supplied the defect, by giving parties entitled to compensation the powers provided by the Lands Clauses Consolidation Act for proceeding to arbitration and summoning a jury. The fact that injury was likely to ensue was to be the sole motive for employing the machinery of the act, and the jury would assess the quantity as well as value of the coal to be left. If the jury found that it was not necessary to leave any coal there, the owner would be entitled to no compensation. That the whole question was, whether the owner was or not legally entitled to compensation, and a sufficient legal court was established by the act for settling this without the interference of a court of equity. That there were no equitable circumstances to bring this case within the jurisdiction of the Court. The Company had, at all events, expressed an opinion that the defendants could not proceed with the working of the coal without injury to the canal, and that was sufficient to justify the defendants in taking the steps provided by the act for estimating the amount of compensation to which they were entitled.

Mr. *J. Parker* and Mr. *Metcalfe* contended, that the facts as stated by the bill did not entitle the defendants to compensation, and therefore the Court had the power to prevent them from taking steps which seemed to presume the right. The words of the 34th section did not refer to absolute injury, but to qualified or unnecessary injury, in consequence of the owners proceeding in an unworkmanlike manner. It was so decided in *The Dudley Canal Company* v. *Grazebrook*(*a*). That the Company were the parties entitled to judge of the injury likely to be suffered by themselves; and if they considered that it would be more beneficial to suffer the injury

(*a*) 1 B. & Ad. 59.

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than to buy the coal, they had the power to do as they had done in the present case, viz. to allow the owner to proceed, he being only liable for injury done to the canal in the event of his getting his coal in an unworkmanlike manner. It never could be the intention of the legislature to compel the Company to buy coal, amounting to 2000*l.*, when the injury likely to be inflicted might only amount to 20*l.* The case of injury to the coal-owner was not made by the answer, nor was it alleged that he apprehended any from the canal: the sole reason for his discontinuing to work his coal was, that he might be liable for any injury which might thereby ensue to the canal. The Company had exonerated them from all liability, by not calling upon them to desist from working; and they had, therefore, no right to compensation; and the Court had the power to declare that they had not brought themselves within the act, and to prevent them from summoning a jury.

The LORD CHANCELLOR, without hearing a reply.—If the coal-owner sustains injury, by getting less coal, or by working in a less beneficial manner, for the sake of not injuring the canal, he will, in the same manner as if he be under notice to leave a third of the coal or a pillar, have a right to compensation. In this case both parties at one time concurred in the belief that injury was likely to be done to the canal by working the coal under it; but now the Companies say no damage will be done. The question is, whether the defendants are to be restrained from taking any proceeding to have the amount of compensation for coal claimed, in consequence of the notice given to the Company, settled by arbitration, and from in any other manner enforcing, or taking any proceeding to enforce, the payment of the compensation for coals claimed by the defendants.

Now, in order to decide that question, it is not necessary to come to any conclusion as to the rights of

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the parties in regard to the matters in difference between them. But, in order to resist this motion, the plaintiff must shew such an equity as entitles him to the interference of the Court, by injunction. The conclusion to which the Vice-Chancellor came was, that there was an equity, because, under the Canal Act, the coal passed to the Company, and that the defendants had no right to compensation for any coal under the canal, and that the owner must have received compensation at the time the canal was made; but the facts of the case do not support any such equity, and I cannot come to that conclusion, which is inconsistent with the terms of the act. It appears to me that that act gave the right of working under the canal, on the terms that no possible injury should be done to the canal. The 34th clause provides, "that nothing therein contained shall affect the right of the owners of land through which the canal shall be made to the mines and minerals lying within or under the lands to be made use of for the canal," &c.; but all such mines and minerals were thereby reserved to such owners of land, and it should be lawful for such owners of land (subject to the conditions and restrictions therein contained) to work, get, &c. such mines and minerals, "not thereby injuring, prejudicing, or obstructing the canal." Now, that clause, read by itself, is free from any ambiguity or doubt. The owner of land may work and carry away the coal, provided he does no harm to the canal in getting it. That is a restriction on his right; whether the Company purchase the coal or not, he is restricted from getting it if he thereby injure the canal. It is necessary, in any event, that he should provide, at his own risk, against any mischief to the canal. Then the 35th section provides, "that if the owner or worker of any coal or other mine shall, in pursuing such mine, work near or under the canal, so as, in the opinion of the Company, to endanger or damage the same, or in the opinion of the owner or worker of the mine to endan-

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ger or damage the further working thereof, then it shall be lawful for the Company to treat and agree with the owner or worker of all such mines or minerals as might be near or under the canal, and should be thought proper to be left for the security or preservation of the canal or mine as aforesaid;" and, in case of disagreement, the commissioners, at the request of either party, were to summon a jury to assess what satisfaction the owner or worker of the mine should receive from the Company. The plaintiff says he has an equity to restrain the defendants, because they are using the machinery for ascertaining compensation under the modern acts, for a purpose not contemplated by the Canal Act. The owner is entitled to take his coal, but not so as to injure or destroy the canal. The 34th section expressly says he may take so much as he can, consistently with the rights of the Canal Company. It may be proper, for the safety and preservation of the canal, to take some part and leave other parts of the coal. The damage may be partial only, or he may be obliged to work in a less beneficial manner; and then the 35th section applies, and the machinery of the act is put in operation to ascertain how much the coal-owner is prejudiced. There might be a case where no damage to the owner would accrue. If the coal-owner's power and control over his mine be not interfered with by the rights vested in the Company, then it will not be necessary to put in operation the machinery of the act if the damages be merely imaginary; but I have it in evidence that the agents of the Company at one time thought there would be injury to the canal by the defendants working their coal, and notice to that effect was given to the coal-owner.

The claim made by him may exceed the amount of compensation to which he is entitled, or it may not. I do not know how much may be recovered by the owner; but, when the machinery provided by recent acts was not in operation, the defendants were unable to assess the amount of

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their claim. They are now entitled to proceed, not for the purpose of seeing whether the Company like to purchase the coal or not, but to ascertain whether there be or not any injury either to the owner of the coal or the Canal Company.

There was a negotiation by certain authorised agents of the Company, who were employed to treat with the owner as to the quantum of damage, and they were of opinion, that his continuing to work would injure the canal. The amount of damage is a matter of evidence, but the ground on which the plaintiff comes for an injunction is, that there is no injury. If I had been satisfied that no injury would arise, and that there was no damage to the defendants, I might have interfered by injunction to prevent the defendants taking any proceedings. But it is clear that it was at one time thought, by both parties, that injury would arise; and I cannot say the defendants are wrong in submitting this case to the proper tribunal, to ascertain how much compensation they are entitled to, that tribunal being expressly provided to decide matters of right between owners of mines and the Company. But the injunction prohibits their doing that. I do not see that the Vice-Chancellor gave any opinion on this part of the case, as he decided that the owner must be presumed to have received compensation. On that view of the case, the order of the Vice-Chancellor must be discharged, and the injunction granted by him must be dissolved, but without costs.

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BEFORE THE MASTER OF THE ROLLS.

Nov. 24th.

Re THE HULL AND SELBY RAILWAY COMPANY.

Parties to certain pending suits petitioned to have a sum of money, which had been paid into Court by a Railway Company, invested in trust, in the suits, and also to have the dividends invested and accumulated.

Several of the parties to the suit appeared by their counsel, to consent.

Held, that the Railway Company was bound to pay the costs of all.

THIS was the petition of two of the parties to certain suits pending in Chancery, claiming to be entitled to 1880*l.*, the purchase-money paid by a Railway Company in respect of land taken by them under the powers of their act, and it prayed the investment of that sum in the purchase of Bank 3*l.* per Cent. Annuities, in trust, in the causes, to an account of certain persons parties thereto in the petition named; and it also prayed the investment and accumulation of the dividends until the determination of the causes, and a reference to the Master to tax the costs, charges, and expenses of all parties of and relating to the application, and the investment consequent thereon; and that the Railway Company might be ordered to pay the same.

The parties claiming an interest in the fund were very numerous, and, having all been served with the petition, appeared by their counsel, to consent.

Mr. *Glasse*, for the petitioners.

Mr. *Macqueen*, for the Railway Company, objected to that part of the prayer of the petition which asked the costs of the parties generally. The Company did not object to pay the costs of the petitioners, but they did object to pay the costs of appearance of parties merely claiming an interest in the fund. They ought to have joined the petitioners in this application, and not have put the Company to the expense of their appearing merely to consent. He contended that the Company were not liable to pay the costs of litigating parties, and that they were expressly excepted by the 49th section of the general act. The Company also ob-

jected to the length of this petition, and requested the Court to direct the Taxing Master to look into the petition, and distinguish, under the 122nd General Order of May, 1845, what parts thereof were improper, or of unnecessary length.

Mr. *Cankrien*, for some of the parties interested, contended, that this was not a mere prayer for investment, but for an absolute transfer of the fund out of the hands of the Railway Company, which would ultimately save them expense; that the costs were provided for under the 80th section of the Lands Clauses Consolidation Act; that the exception contained in the 49th section of the general act, with respect to parties litigating, had reference to persons litigating under the act, and not to persons claiming an interest in the fund independently of the act; and he asked that the costs of the parties for whom he appeared might be ordered to be paid by the Company, or to be costs in the causes, or to be paid by the petitioners.

Mr. *Morris* appeared for thirteen other parties, to consent.

The MASTER OF THE ROLLS.—I have no doubt this is a proper investment, and one which all parties think is for their benefit; but I must state, that I do not consider the investment of a fund in cash in Government securities a matter of course. The state of the fund being varied may diminish its value, and be prejudicial to some of the parties interested; and, on this account, it is not my custom to make the order for investment, except after the parties interested in the rise and fall of the stock into which the fund may be converted, have had an opportunity of considering whether they will or not consent to the investment. An old banker, being asked when was the proper season for investment, answered, "Whenever you have

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any money;" but I cannot act upon this opinion, and for the reasons I have stated, I do not consider it a matter of course, but a case in which the opportunity of consideration must be allowed to the parties interested.

In this particular case I do not say that it was wrong to bring all the parties before the Court; although, if all could have joined as co-petitioners, it might have been more proper. This petition prays something more than the mere investment; it prays that the fund may be taken out of the hands of the Company, and invested in the causes now pending in the Court between the parties claiming to be entitled to the fund. I do not, however, think, that, if this petition had merely prayed an investment of the fund, I should have considered it a matter of course, but that I should have allowed the parties interested in the fund the costs of their appearance. But that is not the present case.

I have oftentimes had occasion to observe on the imperial powers conferred by the legislature on these companies, by which they are enabled to take away any man's land from him by force, whether he will or not, without giving him a voice in the matter. The laws, then, are bound to protect individuals whose rights have been invaded for the public good, against these companies; and if persons are put to expense by having their land taken away from them by these extraordinary powers, it surely would be unreasonable that they should be obliged to bear that expense.

It has been urged before me that this petition is unnecessarily long; and I will not refuse, if the Company require it, to refer it to the Master; but that is an expensive proceeding, and I give them an opportunity of considering whether it is advisable for them to take the order.

Mr. *Macqueen*, on behalf of the Company, having declined, the order was made according to the prayer of the petition.

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BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

SHAW *v.* FISHER. *Jan. 25th & 26th.*

A., the registered owner of certain shares in a Railway Company, sold the same by auction to B.; B. afterwards sold to C., but no transfer was executed, and A. remained the registered owner, and liable for calls:—*Held*, that B. was bound to do all acts necessary to relieve A. from liability in respect of the shares sold, and specific performance decreed, subject to a special reference as to title and amount of calls due.

THE bill in this case was filed by the registered owner of twenty-five shares in the Newry and Enniskillen Railway, and it stated the act for the incorporation of the Company, and that the plaintiff had, before November, 1845, paid 2*l.* 10*s.* deposit on each of the shares.

That, on the 7th November in the same year, the plaintiff sold the said shares by auction, in one lot, numbered 152, to the defendant, at 1*l.* 8*s.* 6*d.* per share, amounting in the whole to 35*l.* 12*s.* 6*d.*; and on the 27th of the same month the purchase-money, less the commission on the sale, was paid by the auctioneers to the plaintiff.

The bill then alleged, that the plaintiff was thereupon, and had ever since been, ready and willing to transfer the shares to the defendant, or as he might direct; but he had hitherto refused or declined to tender to the plaintiff, and execute himself, or procure to be executed by some other proper person or persons, a transfer or conveyance of the twenty-five shares, as required by the special act of Parliament, or the Railway Clauses or Lands Clauses Consolidation Acts, or any one of them.

That, since the date of the sale two calls had been made, one of 2*l.* per share, payable on the 21st February, 1846, and the other 2*l.* 10*s.* per share, payable on the 8th of August, 1846, which, with interest thereon from the respective dates when the calls became due, were then owing.

That the plaintiff, as the registered owner, was legally liable for the calls and interest, and had been called on to pay them by a letter from the solicitors of the Company, dated the 7th December, 1846, and threatening legal proceedings in case of default.

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The bill charged, that the defendant, the purchaser, had, on the 21st of the same month of November, sold the shares at an advance to C., and that the agents of C. applied to the plaintiff to execute a transfer of the same, leaving a blank for the name of the transferee, which plaintiff refused to do.

That plaintiff was willing to execute a transfer to C., but that C. had refused, and still refused, to execute or accept any transfer or conveyance of the twenty-five shares purchased by him of the defendant, and to procure himself to be registered as the proprietor of such shares in the Company's books, as required by the acts of Parliament, or one of them.

The bill prayed, that the defendant might be ordered to execute, or procure to be executed, by some other proper person or persons, a proper transfer or conveyance of the twenty-five shares, and procure such transfer or conveyance to be duly registered; and to pay the calls which had been made, or might thereafter be made, upon such shares since the purchases therein mentioned, and before the registration thereof, as required by the said acts; and to pay to the plaintiff, or to indemnify him against, the costs incurred, or which might thereafter be incurred, by him by reason of the defendant not having executed, or procured some other proper person or persons to execute, such transfer or conveyance, and not having procured the same to be duly registered, or duly paid the calls made on the twenty-five shares since the purchase thereof by the defendant.

The defendant put in his answer to the bill, and thereby admitted the purchase and the payment of the purchase-monies; but he stated, that, to the best of his belief, the lot so purchased by him were not shares registered under the provisions of the act, but scrip certificates of shares issued before the passing of the act; and that he purchased such scrip certificates to sell again, and that they were so re-sold, and the scrip certificates handed to the purchaser. The de-

fendant admitted that he had refused, and still refused, to tender or execute, or to procure to be executed, a transfer or conveyance of the twenty-five shares, and he submitted that he was not bound to do so.

Both parties went into evidence, and the defendant endeavoured to shew, that the plaintiff had adopted C. as the purchaser; but the evidence was not conclusive on this point.

Mr. *Swanston* and Mr. *Hallett*, for the plaintiff, contended, that the sale by auction was in the nature of a parol agreement between the vendor and purchaser, of which the Court would decree a specific performance: *Duncuft* v. *Albrecht* (*a*), *Humble* v. *Mitchell* (*b*).

They also cited *Midland Great Western Railway Company* v. *Gordon* (*c*), and *Phené* v. *Gillan* (*d*).

Mr. *Russell* and Mr. *Follett*, contrà, relied on *Humble* v. *Langston* (*e*); and they also contended, that the plaintiff had not shewn that the alleged shares were anything more than scrip certificates of shares, which, according to the decision of *Jackson* v. *Cocker* (*f*), were not assignable.

Mr. *Swanston* replied.

KNIGHT BRUCE, V. C.—The decree, I suppose, must be something of this nature:—The usual decree for a specific performance, and with something added to this effect—if the Master shall find that a good title was not shewn before the filing of the bill, to state under what circumstances it appears that such title was not shewn. It may be that the title was never asked for. If the Master shall find that the vendor cannot make a good title, then he is to state whether it

(*a*) 12 Sim. 189.
(*b*) Ante, Vol. 2, p. 70.
(*c*) Ante, p. 76.
(*d*) 5 Hare, 1.
(*e*) Ante, Vol. 2, p. 533.
(*f*) Ib., p. 368.

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is by reason of any and what act or acts done by him since the sale by auction, that he cannot make such good title; then, what was the nature of such acts generally, and under what circumstances the same took place. Refer it to the Master to inquire whether any and what calls had been duly made, and how they had been paid, what was their amount, and when, and by whom, and under what circumstances they were paid. It is difficult to say what the title in a thing of this sort is, which a purchaser is entitled to have: it may be of the simplest and shortest description, but it is difficult to say that he is to have none. Perhaps, under the circumstances of the case, whether wholly caused by the defendant or not, it would be too much to say that the title has been accepted; probably there has been enough acceptance for that purpose. It may be that some transfer has been made to this person, but that it was made to him as a purchaser from the defendant, at the request of the defendant or his agents. My impression is, that the defendant purchased the shares, then sold them again, and that no transfer has been executed to his nominee, who refuses to register; and the question is, upon whom the loss is to fall (*a*).

(*a*) See next case.

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BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

WYNNE *v.* PRICE. *Feb.* 10*th.*

THE bill in this case was filed by the registered owner of one hundred shares in "The Newry and Enniskillen Railway Company," and it was thereby, amongst other things (*a*), stated, that on the 18th of October, 1845, the defendant, through his agent, J. G., contracted and agreed with the plaintiff's broker, C. S., to purchase plaintiff's shares, at the price of 2*l.* 17*s.* 6*d.* per share; but, according to the practice of the Stock Exchange, the name of the principal who was the purchaser was not required to be disclosed until the 30th of October, 1845, when a note or ticket was sent by J. G. to C. S., requiring him to transfer, or cause to be transferred, one hundred shares into the name of the defendant, as the purchaser.

The purchaser of railway shares on the London Stock Exchange, is bound to do all acts necessary to relieve the vendor from subsequent liabilities in respect of such shares, although no stipulation be made to that effect at the time of the contract.

That, on the 18th of January, 1846, the plaintiff duly executed a proper deed of transfer, with the proper stamp, which was as follows:—"I, E. B. P. Wynne, in consideration of &c., paid to me by T. Price, of &c., do hereby transfer to the said T. Price one hundred shares, numbered &c., in the Newry and Enniskillen Railway Company, standing in my name in the books of the Company, to hold unto the said T. Price, his executors, &c., subject to the several conditions on which I hold the same at the time of the execution hereof; and I, the said T. Price, do hereby agree to take the said shares, subject to the same conditions."

That the transfer-deed was taken to the office of the defendant, and he paid the purchase-money.

(*a*) The bill set out the sections of the Companies Clauses Consolidation Act, (8 Vict. c. 16), relating to the registration of shares.

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That, on the 25th of December, 1847, plaintiff had notice of the neglect or omission of the defendant to cause his name to be registered, by a letter from the solicitors of the Company, demanding the amount of two calls, both made subsequently to the date of the purchase, together with interest, and threatening legal proceedings in the event of such calls and interest not being paid.

The bill charged, that the plaintiff had done all that was necessary or practicable for him to do for putting the defendant in full possession of the shares, and for completely performing the contract; and that, since the date and execution of the deed of transfer by plaintiff, the defendant had been enabled to make himself the formal and registered owner and proprietor of the shares, without any further act or consent on the part of the plaintiff.

And the bill prayed, that the defendant might be ordered to procure the said one hundred shares to be duly and effectually transferred into and registered in the name of the defendant, in the book kept by the Company called "The Register of Shareholders;" and that the defendant might be ordered to execute, if he had not already executed, the deed of transfer, and to deliver the same, duly executed by him, to the secretary of the Company, to be kept by him, in order that a memorial thereof might be entered in the book called "The Register of Transfers;" and that the defendant might be ordered to take, and procure to be taken, all such steps as might be necessary and proper on his part for the purpose of effectually transferring and registering the said shares in the books of the Company, in the name of him, the said defendant; and that the defendant might be ordered to pay the amount of the calls made upon such shares since the sale thereof, with interest; and might be ordered well and effectually to indemnify the plaintiff from and against all losses, costs, charges, damages, and expenses already incurred or sustained, or which might thereafter be incurred or sustained, by plaintiff, on account of the defendant not

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having procured the shares to be registered in his name, or on account of his not having paid the calls which had been made thereon.

The defendant, by his answer, said that he was a stock-broker, and purchased the shares in question for G. W., his principal. That no principals' names were disclosed, either by plaintiff or defendant; nor was it binding on any member of the Stock Exchange to set forth the name of his principal; nor, if a name be given, was it implied that such name was that of the buyer and principal; and that defendant never stipulated or agreed that he would register. That sales of shares were sometimes effected in the Stock Exchange under an express understanding or agreement that the buyer should give a guarantee that he would register, but whenever such guarantee was given the shares were sold below the market price; but that, in the present case, no such guarantee had been given.

Both parties went into evidence. One of the witnesses produced on behalf of the plaintiff deposed as follows, with respect to the usage of the Stock Exchange as to the registration:—"It is now, and was in the month of October, 1845, a practice among brokers in London, in selling railway shares, to stipulate that the buyer should register them in his own name, when there are grounds for apprehending that the purchaser may abstain from registering."

Another witness deposed, "that it was then, and had been for some time past, a frequent practice, rather than a custom, of a seller of railway shares then at a discount, and subject to future calls, to stipulate that the purchaser shall undertake to register."

Mr. Webb, the secretary of the committee of the Stock Exchange, deposed as follows:—"I do know, and it is a fact, that, in many instances, railway shares have been sold on the Stock Exchange, the purchaser of such shares giving, or undertaking to give, a guarantee of registration; but I cannot at this moment recollect any such particular in-

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stances or instance. In such cases or instances it is now, and has been for the last two years, or perhaps longer, but I cannot say whether or no from 1845, the custom on the Stock Exchange, as regards brokers dealing with each other, or with jobbers, to sell railway shares, so guaranteed to be registered by the purchaser in his own name, at a value below or under the market price, sometimes to the extent of from 5*s*. to 20*s*. per share."

On behalf of the defendant; G. W., the principal for whom the defendant stated, by his answer, that he had acted, was examined, and he deposed that the shares had been purchased by defendant, as his agent, and by his order and direction.

Mr. *Swanston* and Mr. *Lloyd*, for the plaintiff, relied on *Shaw* v. *Fisher* (*a*).

Mr. *Russell* and Mr. *A. J. Lewis*, for the defendant, contended, that the plaintiff's own evidence proved, that, by the existing usage on the Stock Exchange, a purchaser was not bound to register himself as owner, unless a particular stipulation to that effect had been made at the time of the contract. They also contended, that the defendant was not acting on his own account, and that G. W., the principal, was the person against whom the bill ought to have been filed.

The VICE-CHANCELLOR, (without hearing a reply), after observing that the facts of the case precluded the defendant from denying a privity between himself and the plaintiff, and that the defence was without apology or excuse, said:—The defendant is bound to have himself registered so as to relieve the plaintiff. He must pay the calls that have been made since the sale, and indemnify the plaintiff against all future calls in respect of the shares. There must be a reference to

(*a*) Preceding case.

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the Master, if necessary, to inquire what calls have been made, when they were made, and what is due on them. The defendant must execute the transfer deed, and deliver the same to the secretary of the Company, in conformity with the act of Parliament; and the plaintiff must authorise the trustees of the Company to deliver the certificates to the defendant; and the defendant must pay the costs of this suit.

BEFORE VICE-CHANCELLOR WIGRAM.

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WALKER *v.* THE EASTERN COUNTIES RAILWAY COMPANY.

June 5th, 6th, & 14th.

A railway company under the wers of their act, with which the Lands Clauses Consolidation Act was incorporated, gave notice to the owner, of their intention to purchase part of his property; but, not requiring immediate possession, they took no steps to complete the purchase. The landowner filed his bill, praying specific performance of the contract created by the notice. The act provided the means of ascertaining the amount of purchase-money and compensation:—

Held, that a court of equity has jurisdiction in a suit so instituted to make a decree which will have the effect of compelling the Company to set the machinery provided by the act into operation.

THE plaintiff in this cause was the owner of certain leasehold houses, workshops, and outbuildings situate at Spitalfields, in the county of Middlesex, some of which were occupied and used by him in his trade of tobacco-pipe manufacturer; and two, numbered 39 and 40, in Wheler-street, were underlet to tenants from year to year.

On the 2nd of September, 1846, the Company caused a notice to be served on the plaintiff, stating, that, in pursuance of the powers and directions of an act then lately passed, to enable the Company to enlarge their stations in London, they required the messuages, &c., described in the schedule, and demanding the particulars of the plaintiff's interest in such hereditaments, and his claims, and offering to treat. On the 3rd of October following, the Company addressed a letter to the plaintiff, to the effect that, unless he sent in his claim, the Company would be

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obliged to serve him with another notice, preparatory to getting a jury summoned to award him compensation in respect of his property. The plaintiff then sent in a claim in respect of the premises intended to be taken by the Company, amounting to the sum of 4000*l.* and upwards, in which was included the sum of 1257*l.*, for the loss of his business by removal.

In the month of December following, some negotiations were entered into by the parties, but they did not agree, and no notice was taken of the plaintiff's claim, up to the 7th of August, 1847, when he sent a letter to the Company complaining of the delay, and requiring the Company to proceed.

The Company, in answer to this application, sent a letter to the plaintiff, stating, that they did not then require his property, although they had settled with and paid one of the tenants for the purchase of his interest, and taken possession of the house let to him, and thereby become tenants of the plaintiff; and the Company promised forthwith to take every necessary step, under the Railway Acts, to get the amount of the claimant's compensation settled and paid; stating, at the same time, that they were then, and had all along been willing, and would at once proceed to get the amount of compensation settled by a jury, according to the plaintiff's request.

The bill, after stating the foregoing facts, prayed that the defendants might be decreed to complete the purchase of the several messuages comprised in the schedule to their notice of the 2nd of December, 1846, by paying to plaintiff the amount at which the same were respectively valued in the claim or statement delivered by the plaintiff to the defendants, together with the amount claimed by way of compensation for the loss and injury he would sustain in his trade, and for the value of the trade, fixtures, furnaces, loss and damage of stock, &c.; and that, if necessary, all proper accounts might be taken, by and under

the direction of the Court, for the purpose of ascertaining the amount, or that the amount might be ascertained and determined in the manner provided for by the Eastern Counties Stations Enlargement Act; and that the Company might be decreed forthwith to take all proper and necessary measures for the better ascertaining and determining the same, pursuant to the provisions of the act; and it also prayed an injunction to restrain the defendants from pulling down the house, No. 40, in Wheler-street, without first paying the purchase-money; and that an occupation-rent might be set on the said house so occupied by the defendants.

The Company put in their answer to the bill, and thereby alleged, that the delay in the satisfaction of the plaintiff's claim had been caused by his refusal to give the Company the necessary information for ascertaining the amount of his profits and the value of his fixtures: that the plaintiff had not given notice to the defendants to proceed by summoning a jury, or by submitting to arbitration, as they were bound to do by the Lands Clauses Act; and they denied their possession of the house, alleging that the statement in their letter to that effect, set out in the bill, was erroneous; and that, if they entered, they did not intend to pull it down.

Evidence was entered into on both sides; and it thereby appeared that the solicitor of the plaintiff had refused the Company the inspection of his books, and it was stated, by the defendants' witnesses, that such evidence was indispensable to enable them to ascertain the amount of compensation.

The *Solicitor-General* and Mr. *J. H. Law*, for the plaintiff, contended, that the notice of itself created a complete and binding contract between the Company and the plaintiff: *Tawney* v. *The Lynn and Ely Railway Company* (*a*);

(*a*) Ante, Vol. 4, p. 615.

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Stone v. *The Commercial Railway Company* (*a*): that, although it was competent for the plaintiff to apply for a mandamus to compel the Company to proceed according to their act, (*Rex* v. *The Hungerford Market Company* (*b*)), the existence of the legal remedy did not oust the jurisdiction of the court of equity to compel specific performance of the contract. The only thing remaining to be done under the contract, was to fix the price; and as the means of doing this was prescribed by act of Parliament, it might, for the purpose of the argument, be considered as accomplished. This case could not be considered as analogous to those in which the Court had refused to decree specific performance, where there had been an agreement to submit the price to arbitration; because, in those cases, if the Court were to decree a specific performance, that decree might be set at nought, if the party named as arbitrator were to refuse to act. In this case, the means of ascertaining the value are certain, and the Court can see its decree carried into effect.

Mr. *Wood* and Mr. *Grove*, contrà.—The case of *Stone* v. *The Commercial Railway Company*, so far as it applies to this case, only proves that parties cannot retire from a contract when entered into; they cannot make a different case before the jury from that made by the contract; but it does not shew that this Court has the jurisdiction of setting the machinery of acts of Parliament in motion: *Weale* v. *West Middlesex Waterworks Company* (*c*); it may indeed exercise its prohibitory powers, if parties are transgressing their prescribed limits, but it has no power to decree specific performance of a contract, which, if it take its inception from, is also to be determined by, the provisions of the act of Parliament. In this case, the plaintiff

(*a*) Ante, Vol. 1, p. 400.
(*b*) 4 B. & Ad. 327, and case in note.
(*c*) 1 J. & W. 358.

cannot proceed by action at law, neither ought he to be allowed to proceed by suit in equity; his remedy is by mandamus, if he have any remedy before the Company take possession. This case is analogous to those in which an agreement is entered into to settle the amount by arbitration: *Dodsley* v. *Kinnersley* (*a*), *Betesworth* v. *Dean and Chapter of St. Paul's* (*b*), *Harnett* v. *Yuldon* (*c*), *Milnes* v. *Gery* (*d*), *Wilks* v. *Davis* (*e*). Until the price is fixed, the contract cannot be said to be complete: it is only a *quasi* contract, of which the Court cannot decree specific performance. The price is of the essence of a contract of sale: *Gourlay* v. *Duke of Somerset* (*f*); but if the allegation in the bill, as to the Company now being in possession of the houses, is to be taken against the plaintiff, then this suit must fail, for, under the 68th section of the Lands Clauses Act, the plaintiff is the person to take the initiative, and not the Company (*g*).

(*a*) Amb. 403.
(*b*) Sel. C. C. 66.
(*c*) 2 S. & L. 566.
(*d*) 14 Ves. 400.
(*e*) 3 Mer. 507.
(*f*) 19 Ves. 431.
(*g*) Sect. 68 enacts, "that if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of fifty pounds, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose, within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or if the party so entitled as aforesaid desire to have such question of compensation settled

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The *Solicitor-General*, in reply.—Although there may be a remedy by mandamus, that does not preclude the plaintiff from coming to equity. As he could not have gained all the relief sought by his bill, by any proceedings at law, he was entitled to proceed by suit in equity: *Pearce* v. *Creswick* (*a*). As to the injunction sought by the bill, *Frewin* v. *Lewis* (*b*) establishes the principle, that if railway companies infringe or violate the rights of others, they become amenable to the jurisdiction of the Court by injunction.

The VICE-CHANCELLOR.—The plaintiff is the owner of houses required by the defendants for the purposes of their railway, and has filed his bill as a vendor, praying the specific performance of an agreement by the defendants to purchase the houses, and an injunction to restrain them from converting a portion of the property, until the price shall be paid and the contract completed.

The first point made by the defendants, who admit their liability to take the houses, is, that at the time the bill was filed no such contract as the bill supposes existed. I think that point is not sustainable. The cases cited for the plaintiff clearly establish that the notice of the 2nd of September, served by the Company upon the plaintiff on the 4th of September, had the effect of making a contract between them for the purchase by the defendants of the

by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts."

(*a*) 2 Hare, 286.

(*b*) 4 My. & Cr. 255.

plaintiff's houses. It is clear that the Company could not, after that notice, have retired from it. After that notice, the only thing to be ascertained was the amount of the purchase-money; and as the mode of ascertaining that is prescribed by the statute, it is in contemplation of law certain, although it remains to be ascertained.

Admitting that a contract existed at the time the bill was filed, the case was likened to those in which a contract having been made to sell land at a price to be fixed by an individual named, it has been holden that, until the price is fixed, a bill will not lie to enforce the agreement. It appears to me, that there is no analogy betwen the cases referred to and the principal case. In the cases cited, the Court had no means of ascertaining the price to be paid. That is not so in the principal case. The contract is a contract to purchase on the terms prescribed by the act of Parliament, and those terms the Court has the means of applying so as to get at the price.

It was said, in the next place, that no instance existed of a bill having been filed for such a purpose as this, and that a mandamus to compel the defendants to issue their warrant to the sheriff to summon a jury to determine the price to be paid for the houses was a proper remedy. I certainly do not recollect any case in which a bill has been filed for the simple purpose of effecting that which might be done by mandamus. But, without relying upon the circumstance that the Company, by their arrangement with the tenant of one of the houses, are in a position which enables them to take possession of and convert that part of the plaintiff's property at their will, and that the bill prays an injunction to restrain the Company from converting it, I cannot, as matter of principle, deny the jurisdiction of the Court to entertain this bill. If after notice by the Company to take the land, and tender of the price, the owner should attempt to deal with the property in a manner injurious to the Company, or simply refuse to exe-

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cute a conveyance, I cannot think that the jurisdiction of this Court would be doubtful; and if that be so, the jurisdiction cannot be denied in the converse case, in which the vendor is plaintiff: *Withy* v. *Cottle* (*a*), *Adderley* v. *Dixon* (*b*). The remedy by mandamus is not specified in the act, and there is nothing, therefore, in the act to deprive the party of any remedy which law or equity furnish for breaches of contract. This is a vendor's bill for the specific performance of an agreement for the sale of houses; and the circumstance that the act of Parliament entitles the purchaser to have the price determined by a jury, cannot oust the Court of its jurisdiction in a case which would otherwise be within that jurisdiction.

I say this, however, without prejudice to the question by whom the costs of the suit should be paid, if extra costs have thereby been occasioned, or if the necessity of litigation shall appear to have been occasioned by the refusal of the plaintiff to give the Company reasonable information and evidence as to the amount of his claim. I observe that the Company admit their liability to take the houses; for by their answer they say they have no occasion for them at present, and insist that the plaintiff should pay the costs of the suit; but the answer does not, although the argument at the bar did, dispute the jurisdiction of the Court.

The case appears to me not to be one in which, admitting in the abstract the jurisdiction of the Court, and reserving the question by whom the costs should be borne in case a decree for the plaintiff is to be made, the circumstances present any special ground for my refusing to entertain the suit. Guarding the Company with respect to costs, there is not, I think, any reason why I should refuse the plaintiff a decree.

An argument was founded upon the 68th section of stat. 8 & 9 Vict. c. 18, which in certain cases would enable

(*a*) 1 S. & S. 174; *S. C.*, T. & R. 78. (*b*) 1 S. & S. 607.

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the plaintiff peremptorily to require the Company to issue their warrant to the sheriff, and on their default recover the amount of his claim. It was said that the power arose here, and I was referred to an allegation in the bill, that the defendants had taken possession of the house No. 40. I find, however, that this allegation is denied by the answer.

Mr. *Grove* having asked a reference as to the title, his Honor intimated an opinion that any proceedings with respect to the title would not stop the jury process.

Aug On this day the Company petitioned for a re-hearing before the Lord Chancellor, and did not proceed to issue their warrant to the sheriff.

The counsel for the plaintiff moved for the four-day order to enforce the decree.

The counsel for the Company opposed the motion, on the ground of their application for re-hearing having been first made, and if it were granted, the motion for enforcing the decree must be refused.

The *Vice-Chancellor* made the four-day order, intimating that the proper course, if the object of the Company was to delay the execution of the decree, was to have applied to stay proceedings.

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BEFORE THE VICE-CHANCELLOR OF ENGLAND AND THE LORD CHANCELLOR.

Nov. 16*th* & 25*th*. *Dec.* 4*th*.

An action was commenced at law by a surveyor against a railway company, to recover a balance due to him for services performed. Payments had been made on account. Three months after the action was at issue, the Company filed their bill, praying discovery and an injunction, on the ground that, from the complicity and mutuality of the accounts, they ought to be taken under the directon of a court of equity:—*Held* by the Lord Chancellor, affirming the decision of the Vice-Chancellor of England, on motion by the Company for an injunction to restrain the action, that this was not a case in which a court of equity will exercise the jurisdiction which it assumes in matters of account concurrently with the courts of law; and that no precise rule exists as to the particular cases in which it will exercise such jurisdiction.

That the Court will in all cases be influenced by any unexplained delay on the part of the plaintiff in equity.

The judgment in the case of *Nixon* v. *Taff Vale Railway* (*a*) considered.

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THE bill in this case was filed in May, 1848, by the above-named Company, praying discovery, and also an injunction to stay an action of assumpsit commenced by the defendant; and further, that the injunction might be perpetual; and that the accounts between the parties might be taken under the order and direction of the Court.

The bill stated, that Messrs. Martin & Fox (both defendants) carried on the business of surveyors and engineers in partnership, from July, 1845, to April, 1847, and during that period made surveys of proposed lines, and, in the character of agents for the Company, incurred various charges and expenses on their account. That large sums were paid by the plaintiffs to the defendants, some of them in advance and some on account of work done, and that mutual accounts had arisen between the parties in respect of such sums. The bill alleged, that the sums so paid and advanced by the plaintiffs were sufficient to satisfy all claims against them by the defendants, but that no settlement of accounts had ever been come to. That, in October, 1847, the defendants sent in accounts containing 400 items of charge, and claiming the sum of 6793*l.* as the balance due to them. That they had commenced an action in respect of such balance, and that they intended to prosecute the same, unless restrained by injunction.

(*a*) 1 H. L. Cas., N. S., 111.

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The bill charged, that 160 of the items in the account were too general (*a*), and that it was impossible for the officers of the Company to estimate the value of the work done, from the accounts rendered. It was further charged, that the plaintiffs could not successfully resist the defendants' claim without the discovery sought by the bill, and that such discovery would enable them successfully to resist the same.

It appeared, that, before pleading to the action, the plaintiffs obtained a judge's order upon the defendants to deliver particulars of the several items of the account, in consequence of which the defendants delivered a more detailed account, which was so far satisfactory, that the judge, on a second application by the Company, refused to accede to it. The defendants put in their answer, denying the existence of mutual accounts, and also that

(*a*) Some of the items were as follow:—1845, July 21st., August, September, October, and November 30th. Attending your engineers over your several proposed lines of railway, and under their instructions directing and superintending preparation of the surveyor's plans, sections, and lithography of the North Kent Line and its branches, (enumerating five), and assisting the engineers in laying or calculating and checking the gradients; making traces for references, levels, and lithographies, and enlarged plans of the several towns upon the various lines; examining and correcting the lithography, and assisting in getting up the plans and sections for the deposits with the clerk of the peace and others, and attendance upon engineers, solicitors, directors, and others, in reference to this business:—

134 days, at 3*l.* 3*s.*	£422	2	0
Cash paid travelling and incidental expenses	135	15	6
Nine assistants 405 days, at 3*l.* 3*s.* .	1257	15	0
Cash paid their travelling and incidental expenses .	446	16	0
Eighteen assistants, 579 days, at 2*l.* 2*s.*	1215	18	0
Cash paid their travelling and incidental expenses .	427	18	0
Nine assistants, 456 days, at 1*l.* 1*s.* .	478	4	0
Cash paid their travelling and incidental expenses .	209	4	0
Cash, maps, &c. .	130	0	0
Presents to assistants, (to stimulate them to use great exertions), by order of Mr. Stephenson . . .	155	0	0

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they had been agents for the Company; they admitted the receipt of the sums alleged by the bill to have been paid to them, and insisted that the balance then due to them was in respect of charges for work and labour done by them for the Company. That the bill had been filed merely to postpone the payment of the balance due.

The remaining material statements of the bill and answer will be found in the judgment of the Vice-Chancellor.

The plaintiffs now applied for an injunction to restrain the action at law.

Mr. *Stuart* and Mr. *J. Baily*, in support of the motion, contended, that in cases where mutual accounts existed between the parties, a court of equity would not permit one of such parties to proceed at law to recover what he alleged to be due, but would direct the accounts to be taken under the direction of that court. That, in the present instance, from the complicity of the accounts a court of law would be a very imperfect tribunal for investigating the rights of the parties, and that it would be impossible to examine the different persons who alone could substantiate the validity of the claims against the Company. That *Nixon* v. *The Taff Vale Railway* supported this view of the case; for admitting, as the defendants did, that, if the action were tried at law, the judge would direct a reference, the observations of Lords *Brougham* and *Campbell*, in that case, were particularly applicable to the present.

Mr. *Bethell*, Mr. *Greenwood*, and Mr. *Taylor*, contrà, contended that the jurisdiction of the Court only applied to cases of mutual accounts: *Kirk* v. *The Bromley Union* (*a*); and not even to all cases of mutual account: *Connor* v. *Spaight* (*b*); *Foley* v. *Hill* (*c*), *Thorpe* v. *Hughes* (*d*); *Rex*

(*a*) 2 Ph. 640.
(*b*) 1 Sch. & L. 309.
(*c*) 1 Ph. 399.
(*d*) 3 My. & Cr. 761.

v. *Rosset* (*a*). That the whole argument in support of the present application has been to the effect that a court of equity has a concurrent jurisdiction with that in which the action has been commenced; but if it were so, it would not interfere where proceedings had been commenced in another court. In *Nixon* v. *The Taff Vale Railway* (*b*), there was no action, and in that respect it entirely differs from the present. The defendants did not, however, admit that the Court had concurrent jurisdiction in a case of this sort; and the mere allegation that the accounts could be taken better before the Master than by proceeding to a reference, or under any other order of a court of law, will not call for the exercise of the extraordinary jurisdiction of the Court by injunction.

Mr. *J. Baily* replied, contending, that the admission in the answer, of the payments made by the Company, of itself invested the accounts with the character of mutuality.

The VICE-CHANCELLOR.—I must say, I think Mr. *Stuart* opened this case with very great fairness, and stated the circumstances as they seem to have been set out in the answer; one of these circumstances, the moment it was stated, struck me in the strongest manner, and induced me to think, that this is not a case in which the Court ought to interfere, upon the ground that it is one of mutual account; for it appears to me that this Court is called upon by the plaintiffs to interfere, after they themselves have behaved in anything but a fair manner towards the defendants, who have brought the action at law.

From what has been stated, it appears that this is only the last attempt, on the part of the plaintiffs, to escape from performing the demands of plain justice. Now, what Mr. *Stuart* stated was this: that it appeared from the answer, that—after, I think, there had been

(*a*) 2 Y. & J. 33. (*b*) 1 H. L. Cas., 111.

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twenty-six attendances made, for the purpose of having a settlement of the accounts—they were put off for nine days, by some gentleman who acted as vice-chairman; and that, on the appointed day, at the end of the nine days, some person, on behalf of the plaintiffs at law, attended, and there was no vice-chairman to receive them. I think the statement is, that there was no one to receive them, and then the plaintiffs at law, from their own unwillingness to proceed harshly and hastily, mentioned they would come, I think, on the following Monday, and they attended then, and there was no one to receive them. We then find, as has been stated, that an action was brought on the 10th November, in the year 1847—an action which was not an action for an account, but a mere action of assumpsit, in which there is nothing to try, but the question whether the plaintiffs at law are entitled, upon the quantum meruit, for the work and labour they have done; and there is no question about a mutual account, or about the sums that have been actually paid by the Company to the plaintiffs at law. It appears that the bill was filed not earlier than the 20th of May in this year; that an answer was put in, as I understand, on the 24th, and the notice of motion for the injunction is not given till the 13th November; and, therefore, a case of more wretched procrastination, on the part of persons against whom a demand has been made at law, appears to me scarcely possible to conceive.

Then, with respect to the substance of the application, the parties are bound, unquestionably, by what they are pleased to state in their bill. I do not lay much stress upon that objection which has been taken to the form of the notice, but I do feel that a great deal of weight is attributable to this passage, which is the final passage in the bill, and to which my attention was called by the defendants' counsel. They charge, "that they cannot successfully resist some parts of the claim of the defendants, without a discovery of the circumstances therein stated from the defendants, but that such discovery will enable

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them successfully to resist the same." Is not this tantamount to a declaration, that, if they have the discovery, they will be able to resist at law all the demands that are made in the action? That appears to me to be the true interpretation of those words. I should say, it is an inference from the statement in the bill, that, having got the discovery, the defendants at law will be able to resist the action, and, therefore, it is not necessary to come into a court of equity.

Upon the substance of the case, it appears to me, that this is not one of mutual accounts—that there is no complication. There may be some difficulty in proving the items, I am willing to admit, but this Court does not arrogate to itself the decision of questions of fact, merely because there may be a difficulty in proving the fact at law. On the contrary, in some of those cases which involve the greatest complicity and the greatest doubt, arising from conflicting circumstances, it is the usual practice of the Court, for that very reason, to send the question to be tried at law. That is the rule with respect to patents, and it is the rule with respect to a vast number of other cases, many of which, from their mere complication, in a court of law may, and often are, determined by arbitration; but with that this Court has nothing to do. The moment it was stated that this multitude of items existed, the idea occurred to me that this case is not unlike a tradesman's bill, the items in which can be best proved by calling the shopman, who from time to time served out the articles, to give general evidence. It may be with respect to thousands of articles, still the jury must hear it; and certainly I do not apprehend that such a case as that would ever be assumed to itself by a court of equity, upon the ground that the Master can better discriminate between the prices than a jury. Then there is nothing in the case, it is merely an action upon a quantum meruit. There may be some length of time occupied about it, or the jury may feel some dif-

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ficulty in making up their minds as to particular items; but it appears to me to be a case which ought to be decided at law; and the plaintiffs in equity have themselves affirmed that it is so, provided only they get the discovery, which they are to have by the answer. They have obtained it; and my opinion is, that altogether it is a most hopeless case to ask the interference of a court of equity against a just demand made by the plaintiffs at law. I think the injunction must be refused, and refused with costs.

Motion refused, with costs.

The plaintiffs now renewed their motion, by way of appeal to the Lord Chancellor.

The same counsel argued the case as in the Court below.

Mr. *Stuart* replied; and, in order to remove the allegation, that these proceedings had been instituted solely for the purpose of delay, offered to pay the amount of the balance into court, which offer was, however, declined by the defendants' counsel.

The LORD CHANCELLOR.—I am of opinion, that this is not a proper case for an injunction. It is applied for on the ground, that, under the circumtances disclosed in the pleadings, justice cannot be done, or not so effectually done, by a trial of the action as by an account taken before the Master. That may be so, but it does not of necessity follow, that the trial of the action ought to be restrained. The observations of two noble Lords in the House of Lords, in the case of *The Taff Vale Railway Company* v. *Nixon* (*a*) have been referred to as expressing

(*a*) 1 H. L. Ca., N. S., 111.

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opinions, that accounts ought to be decreed in all cases in which references would be pressed at Nisi Prius. I apprehend, that those observations were not intended to intimate any such rule or opinion, but were intended only to exemplify the great difficulty in dealing with such cases at law. But be that as it may, I cannot accept any such ground or measure for exercising the equitable jurisdiction of this Court in matters of account. It has rules and principles of its own, although the practical difficulty experienced in proceeding at law does form an important consideration in the exercise of the discretion of this Court. The jurisdiction in matters of account is not exercised, as it is in many other cases, to prevent injustice which would arise from the exercise of a purely legal right, or to enforce justice in cases in which courts of law cannot afford it; but the jurisdiction is concurrent with that of the courts of law, and is adopted, because, in certain cases, it has better means of ascertaining the rights of parties. It is, therefore, impossible with precision to lay down rules or establish definitions as to the cases in which it may be proper for this Court to exercise its jurisdiction. The infinitely varied transactions of mankind would be found continually to baffle such rules, and to escape from such definitions. It is, therefore, necessary for this Court to reserve to itself a large discretion, in the exercise of which, due regard must be had not only to the nature of the case, but to the conduct of the parties. In the present case both concur in satisfying me, that the trial of the action at law ought not to be stayed. It is not a case of mutual account, the only items on one side being certain payments by the Company to the plaintiffs at law, which are not in dispute. The only matter in contest, therefore, is the amount of the claim of the surveyors for services rendered to the Company; they cannot recover for anything they do not prove to have

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been done under proper authority, or for more than they can prove such service to be really worth. That the defendants at law may have required discovery to meet such claim is not now the question; whatever they established a right to, they have had, and it is pretty obvious, from the frame of the bill, that this was all they originally sought, although, to avoid the immediate payment of costs, the bill is made to pray relief. That such was the view the plaintiffs in equity took of their own case is also pretty evident from the course of proceeding. In October, 1847, the account was delivered, and in November, 1847, the action was commenced. In February, 1848, it was at issue, but the bill was not filed till the 12th of May, 1848; and although the answer was filed on the 24th, the application for an injunction was not made until the 13th of November, and now, the cause standing for trial, I am asked to restrain the plaintiffs at law from proceeding in their action.

That this Court ought to be much influenced in cases of this kind by any unexplained delay on the part of the plaintiffs in equity, I stated in *Thorpe* v. *Hughes* (*a*); and it would, I think, be a matter of reproach to this Court, if, in a case of concurrent jurisdiction, a party, having proceeded at law up to the period of trial, should be restrained by injunction from trying his action upon the application of his opponent, who, during that period, without any adequate excuse, permitted him so to proceed without any application to this Court. In the exercise of the large discretion, which in such cases is vested in this Court, I am of opinion, that, under these circumstances, this Court ought not to interfere, and that this motion should be dismissed, with costs.

(*a*) 1 Ph. 399.

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BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

YETTS *v.* THE NORFOLK RAILWAY COMPANY. *Jan. 15th.*

A railway company, indebted on mortgages to become due in future successive years, passed a resolution at a general meeting, that the sums required should be raised by the creation of new shares under the powers of their act, and applied in satisfaction of the mortgages as they respectively became due. Calls were made on the new shares to an amount more than sufficient to pay off the first of such mortgages; and before the second was payable, another call was made on the subscribers for the new shares, two of whom then filed a bill, alleging, that the calls were unnecessary; and that the directors intended to apply the money raised for other purposes than the payment of the mortgages:—Demurrer of the Company, for want of equity, allowed.

THE bill in this case was filed by Yetts and March, two of the holders of certain new 20*l.* shares in the above-named Company, on behalf of themselves and all other holders of the said shares, except seven, against the Company and those seven and two other defendants, named Anderson and Peto.

The bill stated the several acts of Parliament, by virtue of which the Yarmouth and Norwich Railway Company and the Norwich and Brandon Railway Company were respectively incorporated, and also a certain other act by which the before-named companies were amalgamated under the title of "The Norfolk Railway Company."

That, under the powers contained in the said acts, the Norwich and Yarmouth Company and the Norwich and Brandon Company, before their consolidation into the Norfolk Railway Company, and the Norfolk Railway Company since such consolidation, had from time to time, duly raised and borrowed, with the assent of the shareholders, large sums of money, amounting in the whole, in February, 1847, to the sum of 197,000*l.* That the last-mentioned sum was made up of various amounts borrowed by the companies for a certain definite period, becoming due at times fixed by the mortgages and bonds by which the sums were secured, viz. 25,000*l.* in 1848, 20,000*l.* and 52,000*l.* in 1850, and 7000*l.* and 30,000*l.* in 1851.

That, at the ordinary meeting of the Company, in 1847, the chairman and the then directors made their half-yearly report, which contained the following passage:—"It is also proposed to take powers for the creation of

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stock to meet the loan debt of the Company as it becomes due; and for this purpose the directors recommend that an additional capital of 197,000*l.* be raised in shares of 20*l.* each, to be distributed rateably among the proprietors. On these shares a deposit of 5*l.* will be required, and the remainder will be called for at deferred periods, as the mortgage debts become payable. These shares will be entitled to the same rate of dividend as the capital stock of the Company upon the amount paid up."

A resolution was then passed, "That, in pursuance of the powers granted to the Company for that purpose, an additional capital of 197,000*l.* be raised, to be divided into shares of 20*l.* each, and offered to the proprietors of stock and shares, in proportion to their existing interest therein, viz. one 20*l.* share to every 100*l.* stock; such new capital to be applied in payment of the present mortgage debts of the Company; a deposit of 5*l.* to be paid on each share, and the remainder to be called for by the directors as occasion shall require, for effecting the object aforesaid."

That, pursuant to the resolution, a letter of allotment was sent to plaintiffs and the other proprietors, which letter contained a copy of the resolution.

That plaintiffs, relying upon and confiding in the representation of the directors, as to the purposes for which the new shares were to be created, and the times at which they would be required, accepted the new shares and paid the deposit of 5*l.* on each share allotted to them, and afterwards, in the month of June, 1848, paid a call of 5*l.* thereon.

That 8719 new 20*l.* shares were accepted by the various persons to whom they were allotted, and that 42,757*l.* and upwards had been received by the Company in respect of the deposit, and a further sum of 17,958*l.* had been since received by the Company in respect of the call, making in the whole a sum far exceeding the portion of the debt then due from the Company.

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That the Company entered into an agreement to lease their line to the Eastern Counties Railway Company, to be worked under the direction of a joint committee, the latter Company taking upon itself payment of interest on borrowed capital and guaranteed shares, and to pay the shareholders a dividend after the same rate as should be declared on their own capital stock; and the debts and liabilities of the Norfolk and Lowestoft Companies were to be liquidated under the direction of the joint committee, aided by the Eastern Counties Company, who were to have a lien and charge upon all the property of the Norfolk Company for any sum which they might advance for that purpose.

That the agreement was approved at a general meeting, and a resolution passed for an application to Parliament to carry it into effect, but no act had been obtained.

That, on the 16th of November, 1848, plaintiff Yetts received notice of another call; and in answer to a letter addressed by him to the secretary of the Company, protesting against such call, and requiring to know by what authority it had been made, he received the following reply:—"I beg to state, that the call has been made by the board of directors of the Norfolk Company, and I understand that the money received for the call is to be applied to the discharge of liabilities now pressing on the Company."

The bill charged, that the secretary, in answer to a similar protest by another holder of shares, by letter dated the 14th of November, 1848, had admitted that the shares were expresssly created to pay off the mortgage bonds, which became due in 1847, 1848, 1850, and 1851, and the letter contained the following statement:—"The only explanation I can now give of the call made by the directors, and payable on the 15th of December, is, that the Company have to meet liabilities this year, consisting of a repayment of a temporary loan and of law agents' bills, &c., which must be provided for, and they have no other source open to them but to make a call on these shares."

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The bill prayed that the resolution of the 23rd of February, 1847, might be declared valid and binding on the Railway Company and the directors, as or in the nature of a contract between them and the holders of the new shares, and that the Company and directors might be restrained by injunction from commencing or prosecuting any action against the plaintiffs or the other holders of the new shares, for enforcing payment of the second call, and from declaring any forfeiture of the shares; and also, that an account might be taken of the sums received; and that the defendants might be restrained from applying the amount remaining in the hands of the Company, in any manner, or for any other purpose, than that directed by the resolution of February; that an account might be taken of the debts due from the Company, &c.

To this bill the Company demurred, for want of equity.

Mr. *Bacon* and Mr. *Speed*, in support of the demurrer, contended, that the powers of the Company to raise sums of money by creating new shares were given for the general purposes of the act. The directors had no power to raise money for any particular purpose; that the sums raised must form part of the general capital; and unless the Company were about to misapply the funds, the Court could not interfere; that the payment of the existing debts and liabilities could not be considered an improper application.

That the new shareholders were not less liable than the original shareholders for the debts of the Company, of which they had constituted themselves members. That, if the present plaintiffs were not satisfied with the manner in which the funds were about to be applied, their proper remedy was to call a general meeting; but this Court would not interfere in quarrels between shareholders, where the act provided a remedy. [The cases of *Mozley* v. *Alston* (*a*), *Foss* v. *Harbottle* (*b*), *Lord* v. *The Copper*

(*a*) Ante, Vol. 4, p. 636. (*b*) 2 Hare, 461.

Miners' Company (*a*), *Crediton Railway Company* v. *Buller* (*b*), were relied on.] It was also contended, that the amalgamation with the Eastern Counties Railway Company, by general consent of the shareholders, gave the joint committee full power over the fund, and rescinded any contract which the plaintiffs might have supposed to exist.

Mr. *Wigram* and Mr. *Campbell*, in support of the bill, contended that the present was very different from the cases cited. That the bill, in this case, was filed for the purpose of protecting the shareholders from the directors, and to prevent them from virtually annulling a resolution passed by the shareholders. The object for raising the money was the payment of certain mortgages not yet due, and if the money was now applied for other purposes, the shareholders would at some future time be called on for another subscription to pay off the very debts which they supposed they were subscribing to satisfy. If this had been a case of common partnership, and the partners had subscribed a sum for a given purpose, would not the Court interfere to prevent one partner from applying it to any other?

The VICE-CHANCELLOR, without hearing a reply upon the question of equity.—I am not sure that, independently of the recent authorities which have been cited, I should not have held the demurrer sustainable; but those decisions, and the judicial opinion expressed in respect of them, are, as it appears to me, inconsistent with supporting this bill. What course I might have taken, if the authorities had been in a different way, it is needless for me to say; but, I repeat, that, independently of those authorities, I am not sure I should not have allowed the demurrer.

Demurrer allowed.

(*a*) 2 Phil. 740. (*b*) Ante, p. 211.

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BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

Jan 19*th*.

FEVERSHAM *v.* CAMERON'S STEAM, COAL, AND RAILWAY COMPANY.

At a general meeting of the shareholders of a railway company a resolution passed, "That the directors be and are hereby authorised, to borrow on mortgage, bond, or otherwise, such sums, for such periods, and at such rates of interest, as they may deem expedient, in accordance with the provisions of the deed of settlement and act of Parliament." At a meeting of the directors, three of that body offered to advance a sum of money on security of the calls and of the property of the Company. The Company thereupon gave an authority to the bankers to hold all sums paid on account of calls to the credit of the lenders; but before all the sums advanced had been repaid, the Company withdrew that authority. The lenders then filed their bill, praying an account, a receiver, and payment of their balance. To this bill the Company put in a general demurrer, for want of equity.

It was not alleged that the agreement for the loan had been submitted to a general meeting of the shareholders, in accordance with the 29th section of the Joint Stock Companies Registration Act:—*Held*, that the contract was invalid, and demurrer accordingly allowed, with liberty to amend.

The property of the Company consisted of mines and collieries, and the rate of interest reserved was 7*l*. per cent. *Quære*, whether the contract was not invalid on this ground also!

THIS was a demurrer in bar to the discovery sought by the bill, and generally for want of equity.

The suit was instituted by three persons, A., B., and C., directors of the above-named Company against the Company. The bill stated, among other things, that the Company had been completely registered, pursuant to 7 & 8 Vict. c. 110 (*a*); and that, at a general meeting of the Company, held in July, 1847, a resolution was passed, "that the directors be authorised to borrow, on mortgage, bond, or otherwise, such sums, for such periods, and at such rates of interest, as they may deem expedient, in accordance with the provisions of the deed of settlement and act of Parliament" by which the Company were established and incorporated.

That, previously to the 8th of September, 1848, calls had been made by the directors of the Company, which were then unpaid, to a large amount; and at an adjourned meeting on that day, the plaintiff, B., stated to the Board, that the plaintiffs would advance 10,000*l*. or 15,000*l*.; whereupon the directors passed a resolution to the effect, that the offer should be accepted, and that the secretary be ap-

(*a*) The Joint Stock Companies Registration Act.

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pointed, in conjunction with the solicitor, to see the business legally and properly carried out and completed.

At the same meeting, the solicitor and secretary of the Company made a report that the proposed loan might be completed, by granting to the lenders the promissory note or notes of the Company, at seven per cent. per annum; and that the lenders should have security for such advance on the calls then and thereafter to be made, to the extent of the sums advanced; and that the lease of the Company's property be deposited by way of equitable mortgage, and as security for such loan.

(The property of the Company consisted, among other things, of certain mines and other hereditaments, in the nature of real estate).

The report, as signed by the secretary and solicitor, was then unanimously approved, and a resolution, embodying the report, was passed, and duly minuted in the books of the Company; and on the 9th September, in conformity thereto, the plaintiffs paid to the Company 1000*l.*, and received a promissory note for that amount, signed by two directors; and at the same time, in pursuance of the resolution, a letter was addressed to the bankers of the Company, authorising and directing them to carry all sums paid on account of calls to the plaintiffs' account until that letter should be revoked by another, signed by two directors, and countersigned by the secretary.

This bill was filed in consequence of a letter revoking the last-mentioned authority and direction; and it prayed an account of what was due and owing to the plaintiffs—an account of sums paid in respect of calls after the 8th September—an injunction to restrain the Company from further receiving any money in respect of calls, or enforcing their letter of revocation, or any other to the same effect, repugnant to the letter of the 9th September, 1848. The bill also prayed a receiver, and that the monies paid

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in respect of calls might be secured for the plaintiffs, and the balance due to them paid.

It was not alleged in the bill, that the terms of the loan had been submitted to any general or special meeting of the shareholders, in accordance with the 29th section of the 7 & 8 Vict. c. 110 (*a*).

Mr. *Russell* and Mr. *W. W. Cooper* contended, that the demurrer must be allowed, inasmuch as the contract upon which the plaintiffs founded their equity was, by their own shewing, totally invalid, on two grounds: *first*, that it was tainted with usury; and, *secondly*, because the requisitions of the 29th section of the Registration Act had not been complied with.

Mr. *Swanston* and Mr. *Prendergast*, in support of the bill, contended, that the resolution of the majority of the shareholders, authorising the directors to borrow on mortgage, bond, or otherwise, such sums as they might deem

(*a*) The Joint-stock Companies Registration Act. The 29th section is as follows:—"That if any director of a joint-stock company, registered under this act, be either directly or indirectly concerned in any contract proposed to be made by or on behalf of the company, whether for land, materials, work to be done, or for any purpose whatsoever, during the time he shall be a director, he shall, on the subject of any such contract in which he may be so concerned or interested, be precluded from voting or otherwise acting as a director; and that, if any contract or dealing (except a policy of insurance, grant of annuity, or contract for the purchase of an article or of service which is respectively the subject of the proper business of the company, such contract being made upon the same or the like terms as any like contract with other customers or purchasers,) shall be entered into, in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders, to be summoned for that purpose; and that no such contract shall have force until approved and confirmed by the majority of votes of the shareholders present at such meeting."

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expedient, invested them with powers equivalent to those which any subsequent general meeting could confer. That the directors were, in fact, carrying into effect a resolution already made by the shareholders, which required no ratification. That the terms of the 29th section, referring to "contract or dealing," were not intended to interfere with the powers of directors to raise money for the purposes of the Company. That, if the contract were invalid, still there was sufficient to support the bill; for the Company had acknowledged the receipt of the sum advanced by the plaintiffs, and were accountable.

The VICE-CHANCELLOR.—It is not necessary for me to express any opinion on the question, whether this contract is or not invalid on the ground of usury. It appears to me that the bill, as it at present stands, is particularly affected by the 29th section of the Registration Act.

I shall allow the demurrer, with liberty to amend.

Mr. *Russell*, on the question of costs, submitted that he was entitled to them, as representing the innocent body of shareholders, who had nothing whatever to do with the contract.

His Honor, however, reserved the costs.

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COURT OF EXCHEQUER.

Easter Term, 1848.

May 16th.

DUKE (Knt.) and Others *v.* ANDREWS.

The defendant applied, by letter, to a projected railway company for 100 shares, undertaking to accept the same, or any less number, and to pay the deposits. He received a letter of allotment for 60 shares. This letter was headed "Not transferable." In an action by the Company against the defendant, to recover the amount of the deposits:—*Held*, that there was no binding contract, the proposal being absolute, and the acceptance conditional, it containing a qualification that the contract was not to be transferable.

ASSUMPSIT on a special contract against the defendant as an allottee of sixty shares in the Dorking, Brighton, and Arundel Atmospheric Railway, to recover the sum of 126*l.*, being a deposit of 2*l.* 2*s.* on each share.

The defendant pleaded non-assumpsit and other pleas.

The cause came on for trial at the London sitting after Trinity Term, 1847; and a verdict was taken by consent, for the plaintiffs, for 126*l.* damages, subject to the opinion of this Court upon a special case, in which the following facts appeared:—

The plaintiffs, the committee of management of the above-mentioned railway, having issued a prospectus of the Company, the defendant, on the 10th of October, 1845, wrote to the secretary of the Company a letter of application for shares, in the following terms:—

"To the Committee of the Dorking, Brighton, and Arundel Atmospheric Railway, by Horsham and Shoreham.

"I request you to allot me 100 shares of 20*l.* each in the above undertaking; and I hereby undertake to accept the same or any less number which may be allotted to me, and to pay the deposits thereon, and to execute the parliamentary contract and agreement when required. Dated this 10th day of October, 1845.

"*Name in full*—John Holman Andrews.

"*Residence*—27, West-square, Lambeth.

"*Business or profession* (*if any*)—Silk and ribbon agent, 26 and 27, Addle-street, City.

"*References*—A. B. and C. D."

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On the 25th of November, 1845, the managing committee sent the following letter of allotment to the defendant:—

"Not transferable.—25.

"The Dorking, Brighton, and Arundel Atmospheric Railway.

"No. A 23. Shares, 60. Deposit, 126*l.*

"Offices, Adelaide Hotel, London Bridge, November 25th, 1845.

"SIR,—The Committee having, upon your undertaking, agreed to allot to you sixty shares of 20*l.* in this railway, I have to request that you will pay the deposit of 2*l.* 2*s.* per share, amounting to 126*l.*, to the account of the Company, to either of the under-mentioned banks, on or before the 9th day of December, 1845.

"This letter must be produced at the time of payment, and the bankers' receipt will afterwards be exchanged for the scrip certificate, upon your executing the parliamentary contract and subscribers' agreement, which will lie for signature at the office on and after Friday, the 21st day of November instant; and, for the convenience of persons residing in the country, at such other places and times as will be announced by advertisement in the local newspapers.

"I am, sir, your obedient servant,

"R. TURNER, Secretary pro tem.

"John Holman Andrews, 27, West-square, Lambeth.

"The London and County Bank, Lombard-street and Brighton, and at the several country branches.

"Messrs. Hall, West, & Borrer, Union Bank, Brighton.

"N.B.—The Parliamentary contract and subscribers'

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agreement must be executed by you before the 15th day of December, 1845.

"No. November , 1845.

"Received on account of the Committee of Management of the Dorking, Brighton, and Arundel Atmospheric Railway Company, to account for on demand.

"For

"£

"In order to prevent mistake or error, the subscriber will be pleased to fill in the following blanks in his own handwriting, at the time he obtains this receipt:—

"*Name of subscriber in full*—

"*Place of business (if any)*—

"*Place of residence*—

"*Profession or trade*—

"*Subscriber's usual signature*—"

The defendant received the above letter of allotment, but took no notice of it, nor did he pay any deposit. Very few of the allottees paid their deposits, and the Committee of Management were prevented by want of funds from bringing the scheme before Parliament.

It was agreed that the Court should be at liberty to draw the same inferences as a jury.

The question for the opinion of the Court was, whether the plaintiffs, under the above circumstances, were entitled to recover in this action against the defendant. If the Court should be of opinion in the affirmative, then the verdict was to be entered for the plaintiffs, with 126*l.* damages; but, if the Court should be of a contrary opinion, then a nonsuit was to be entered.

J. Brown, for the plaintiffs.—The defendant contends, that, as the letter of allotment contained the words, "not transferable," it introduced new terms into the contract contained in the letter of application; and that the de-

fendant, not having accepted those terms, the contract was not binding upon him: Sugden's Vend. & Pur. 165. This position is not disputed by the plaintiffs; but they contend, that the letter of allotment does not introduce any new terms into the contract. The words "not transferable," form no part of the contract, and amount to a mere caution to the allottee, that the contract is not legally assignable. But, admitting that these words were more than a mere caution, and were intended to restrain the allottee from transferring to a third party, yet they do not alter the legal effect of the contract; for, if they are struck out, the contract between the Company and the allottee is not transferable by common law, and, therefore, it cannot be contended, that they are a new term in the contract. [*Parke*, B.—The allottee may have intended to obtain a transferable contract; but if the words "not transferable" are to be understood as a new term in the contract, they may prevent him transferring his equitable right to the shares.] In *Wontner* v. *Shairp* (*a*), the same argument was used upon this point, but the Court of Common Pleas appear to have given but little weight to it. He also contended, that the words "This letter must be produced at the time of payment," did not introduce any new term into the contract, and cited *Vollans* v. *Fletcher* (*b*).

H. T. Atkinson, for the defendant, was not called upon.

PARKE, B.—In this case the defendant is entitled to our judgment. We think there is no binding contract. The defendant makes an absolute proposal, but the acceptance in the letter of allotment is conditional. It contains a qualification that the contract is not to be transferable. A party who purchased this letter of allotment might have bought it thinking it was transferable, whereas the Company say they will not recognise his transferee as the

(*a*) Ante, Vol. 4, p. 542. (*b*) Ante, p. 73.

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holder of the shares. The two stipulations are not *ad idem*, and therefore, there is no valid contract. This appears to have been the opinion of the Court of Common Pleas in *Wontner* v. *Shairp*.

ALDERSON, B. — If the words, "not transferable" were omitted from the letter of allotment, it would bear a very different value.

ROLFE, B. and PLATT, B. concurred.

Judgment for the defendant.

COURT OF EXCHEQUER.

Trinity Term, 1848.

June 28th.

ELLIOT *v.* THE SOUTH DEVON RAILWAY COMPANY.

At the trial of an issue, the question was, whether a railway at a particular place passed through a town within the meaning of the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 11. The judge merely told the jury that the word "town" in the Act was to be understood in its ordinary sense:—*Held*, that this was a misdirection, and that the judge should have given the jury such a definition as would have been a guide to enable them to decide the particular question before them. "Town" in the Act means the space on which the dwelling-houses are collected so near to each other that they may be said to be continuous. *Semble*, an open space occupied as a mere accessory to the convenience of dwelling-houses would also be in the town.

IN this case the Vice-Chancellor of England had directed an issue to try whether the South Devon Railway, in deviating their line passing over lands of which the plaintiff was the owner and occupier, was passing through a town, within the meaning of sect. 11 of the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20), which enacts, that, "in making the railway, it shall not be lawful for the company to deviate from the levels of the said railway, as referred to the common datum line described in the section approved of by Parliament, and as marked on the same, to any extent exceeding, in any place, five feet, or in passing through a town, village, street, or land,

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continuously built upon two feet, without the previous consent, in writing, of the owners and occupiers of the land in which such deviation is intended to be made." It was admitted, by the Vice-Chancellor's order, that the railway, in passing over the land so owned and occupied by the plaintiff, had deviated, without the plaintiff's consent, from the level, as referred to the common datum line, more than two and less than five feet. The issue was tried before *Wightman*, J., at the Exeter Spring Assizes, 1848, when it appeared that the plaintiff was the owner of, and occupied, certain fields. There was no doubt that these fields, a few years ago, were in the country, but that, owing to the rapid increase of the town of Plymouth, the land immediately adjoining the plaintiff's was now covered with houses, and that, on three sides, his land was now bounded by streets. On the fourth side, however, it was bounded by land intended for building ground. Although the plaintiff's land, from its situation, would, in all probability, very soon be built upon, and on that account had become of great value, it was as yet occupied as pasture land. The jurisdiction of the authorities of Plymouth for lighting and paving the roads extended considerably beyond the plaintiff's land.

The learned Judge told the jury, that the word "town," as used in the act, was to be understood in its ordinary and popular sense; that it was for them to say where the town ended and the country began; and that the lighting, &c. was a circumstance, not a test. The jury found, that the railway, on the plaintiff's land, was passing through a town, within the meaning of the act.

A rule having been obtained calling on the plaintiff to shew cause why there should not be a new trial, on the ground of misdirection on the part of the learned Judge, in not properly explaining to the jury the meaning of the term "town"—

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Cockburn and *Smith* now shewed cause, and contended, that the word "town" did not necessarily mean land covered with houses: it may include land like the plantiff's, although green fields. [*Alderson*, B.—A railway passing through the Temple Gardens or St. James's Park would be passing through a town, although over land unbuilt upon.] The learned judge sufficiently directed the jury when he told them that the word was to be understood in its ordinary and popular sense. The meaning of the word was not controlled by any part of the act, and the jury were as capable of understanding it as the Court. [*Rolfe*, B.—This case resembles *Baddeley* v. *Gingell* (*a*), where the question for our decision was, what houses were within the street. Where there is difficulty in applying the words used in the statute, the judge, in leaving the question to the jury, should give them some guide. Had he given a definition of the word "town," which would be inaccurate as applied to another state of facts, it would be no misdirection if it were accurate as applied to the particular facts before the jury; but I think it a misdirection to give no definition at all. *Platt*, B.—If a railway passed over Primrose-Hill, would it pass through a town? In that case, how ought the question to be left to the jury? *Alderson*, B.—I think a jury would not say that a railway passing over Primrose-Hill was passing through a town; but if Primrose-Hill become "town" by the building of certain streets, though itself untouched, there must be a reason why the building of those streets should make the difference. To that extent the judge should have defined the word "town" to the jury; he should have told them what must be the state of the surrounding land before the place ceased to be in the country.]

Kinglake, Serjt., in support of the rule.—The judge should have given the jury a definition of the word "town,"

(*a*) 1 Exch. 319.

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as used in the act of Parliament. It is there coupled with the terms "village, street, or land continuously built upon," and therefore applies to something different from these. The act does not use the word in the sense of the legal definition, as given in Co. Litt., p. 115. b., where it is said, that, to constitute a town in law, the place must now, or in times past, have had a church, and celebration of divine service, sacraments, and burials. The jury should have been directed that the railway was not passing through a town until it entered the space on which the dwelling-houses of the inhabitants are built. In this case, the railway does not touch a single house or pass through a street, until after it has passed over the plaintiff's land. Such a direction, therefore, would have given the defendants a verdict.

PARKE, B.—I think that there must be a new trial; for, although the learned judge was not bound to give a complete definition of the word "town," including every possible case, yet he should have given the jury a definition sufficiently accurate and comprehensive to be a guide to enable them to decide the particular question before them. That question was, whether the railway, in passing over certain fields, was passing through a town, within the meaning of the 11th section. The word "town" in the act does not mean a town in the legal sense of the word, a place with a constable or a church, but a town in the sense of the space where the dwelling-houses of the inhabitants are contiguous—the space covered by the congregated mass of houses. The question, then, is, could the railway be carried over the fields in question without passing through the contiguous dwelling-houses? An open space unbuilt upon may be part of the town, if surrounded by continuous houses—as, for instance, the green part of Grosvenor-square. So long, then, as the railway passes along the fields, without entering the continuous line of

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houses, it is not passing through the town; but when it has entered the continuous mass of houses, it continues to pass through the town till it passes out across the continuous line of houses on the other side. By a continuous line I do not mean houses touching each other, but a line in which the houses are so near, that, in a popular sense of the word, they may be called continuous.

ALDERSON, B.—I am of the same opinion. What the wall was to towns, as a boundary, in former times, the continuous line of buildings is now. By continuous I do not mean touching, but so close that the inhabitants may reasonably be said to dwell together. When the railway passes through this boundary it begins to pass through the town.

ROLFE, B.—I also think there should be a new trial. The learned judge did not give a definition sufficient for the decision of the particular case. He was not bound to give a definition embracing every case. Even that given by my brother *Parke*, which at first struck me as perfect, is not complete. There are in foreign towns what is called a "place"—a parallelogram of ground with houses on three sides only, cultivated and adorned for the sake of these houses, but opening, on the fourth side, into the country. Such a spot would not be within my brother *Parke's* definition, yet I think it would be town.

PLATT, B.—I also think that there should be a new trial, because the judge has not given the word a sufficiently comprehensive definition, to enable the jury to decide this particular issue on the evidence before them. I do not think he was bound to do more, but that he ought to have done more.

ALDERSON, B.—I think such a "place" as my brother *Rolfe* alludes to would be in the town if it was occupied

as a mere accessory to the conveniences of the dwelling-houses; otherwise, if it was an inlet to the country.

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PARKE, B.—I think so too; and probably a garden attached to a house, and occupied along with it, should be reckoned as part of the house, in considering whether the houses are continuous.

Rule absolute.

COURT OF EXCHEQUER.

Michaelmas Term, 1848.

GILES *v.* HUTT and Others.

Nov. 15th.

Upon an audità querelâ to be relieved from a judgment, the writ set out a deed of settlement of a joint-stock company, by which it was agreed between the defendants and the shareholders, of which the plaintiff was one, that, upon the neglect of any shareholder to pay any call within one calendar month after notice, the directors might, at any time after the expiration of such calendar month, declare that such shares, as to which the full amount should not have been paid, should be forfeited; provided, that it should be lawful for the directors, if they should think fit, to enforce the payment of any call, &c., instead of declaring forfeited any share. It then stated, that the plaintiff having neglected to pay his calls, the defendants sued him, recovered judgment, and levied part of the amount of the calls, and that they afterwards declared his shares forfeited:—*Held*, that the power in the deed was in the alternative, and that, in case of non-payment of a call, the directors might either sue or declare the shares forfeited, but that they could not do both. That the proceeding to judgment and execution was an election by them of their remedy, and that the declaration afterwards, that the shares were forfeited, was a nullity; consequently that the plaintiff was not entitled to be relieved from the judgment.

AUDITA querelâ. The writ stated, that, by an indenture, made on the 1st of March, 1841, between the several persons whose names were or should be inserted in the first schedule, including the plaintiffs, of the first part, and the defendants, of the second part, after reciting that the parties thereto had agreed to raise a capital of 50,000*l.*, by contribution in shares of 500*l.* each, and to form a joint-stock company for the purchase and re-sale and general improvement of lands in the colony of Western Australia. That the capital of the Company should consist of the sum of 50,000*l.*, agreed to be raised in shares of 500*l.* each. That,

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so often as any person should neglect to comply with any of the covenants or conditions in the said indenture contained, it should be lawful for the board of directors to institute any action or suit against such persons. That, subject to the powers thereinafter given to the general and extraordinary meetings of the Company, a board of directors should have the entire management of the capital, &c. of the Company. That, notwithstanding instalments of 125*l.* per share on the shares of the said capital of 50,000*l.* had been paid or otherwise satisfied or provided for, the remaining 375*l.* per share should be recoverable in like manner as was thereinafter provided, in case of any debts being owing by any shareholder to the Company, but no such call (subsequently to the first) should be made until after the expiration of six calendar months from the date of the call immediately preceding. That, upon the neglect or refusal of any shareholder or subscriber to pay up the full amount of 125*l.* per share, in respect of every share in the said capital of 50,000*l.* to which he might be entitled, within one calendar month after notice from the board of directors should have been sent to him by post, requiring payment of the amount due on account of such share, to make up the full payment of 125*l.* per share, with such interest, if any, as the board might think fit, not exceeding 5*l.* per centum per annum, computed from the date of the said indenture, or upon the neglect or refusal of any shareholder to pay any further instalment or call of or on his share or shares in the said capital of 50,000*l.* on or before the day appointed for payment thereof, or within one calendar month after such day, together with all interest, if any, due in respect thereof; then that, in either of such cases, the party so neglecting or refusing should, in respect of every share, as to which there should have been such neglect or refusal, cease to have any right to, or to exercise any of the privileges of, a shareholder, until he should have paid the full amount due in respect of such share, together

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with such further sum, if any, by way of interest or fine thereon, as might be determined upon by a board of directors under the provisions therein contained; and that it should be lawful for the board of directors, at any time after the expiration of such respective one calendar month, either to apportion such sum as they might think just, by way of interest or fine, according to the delay in payment thereof, and to limit a day for the payment of such interest and apportioned sum, and to declare, that, in default of payment thereof on or before such day so limited, the shares in respect of which such default should be made should thenceforth be absolutely forfeited, or it should be in the discretion of the board at once to declare that such shares, as to which the full amount should not have been paid, should thenceforth be forfeited to the Company, and that the persons entitled thereto, under or by virtue of the said indenture, should, in respect of such shares, cease to be members of the said Company, and from and immediately after such default, or any such declaration as respectively last aforesaid, the share or shares as to which any such default or declaration should have been made, and all the privileges and advantages thereto belonging or claimable in respect thereof, should be actually forfeited to the Company. Provided always, that it should be lawful for the board of directors, if it should think fit, to enforce the payment of the amount due in respect of the said sum of 125*l.* per share, or to become due in respect of any such further instalment or call, with interest, from any person who should make default in the payment of the same, instead of declaring forfeited any share on which such amount or instalment should remain unpaid as aforesaid. That the board of directors might, if it should think fit, within three calendar months after any share should become forfeited to the Company, discharge such share from forfeiture, and restore the same to the shareholder or owner thereof, on his paying the amount then due thereon.

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That the board should, at its discretion, sell, for the benefit of the Company, any shares which should from time to time be forfeited, or retain the same. That the said plaintiff, before and at the time of the making of the said indenture, and thence until and at the time of the declaration of forfeiture hereinafter mentioned, was the owner of divers, to wit, ten shares in the capital of the said Company. And that, after the making of the said indenture, and after the sealing and delivering thereof by the said plaintiff and the said defendants, and while the said plaintiff was such shareholder as aforesaid, and after instalments of and upon the said ten shares which he so held as aforesaid, amounting to the sum of 250*l.*, upon and in respect of each of the said shares, had been satisfied and paid, and while only a sum of 250*l.* remained unpaid, upon and in respect of each of the said shares, and after the expiration of six calendar months from the date of the call immediately preceding the same, to wit, from the date of the first call after the making of the said indenture, to wit, on the 15th day of September, in the year of our Lord, 1842, an extraordinary board of directors of the said Company, duly summoned and constituted according to the provisions of the said indenture in that behalf, duly and according to the provisions of the said indenture in that behalf passed a resolution for the payment of a certain instalment or call of and on the shares in the said capital of 50,000*l.*, being the second call after the payment of the said sum of 125*l.* per share in the said deed mentioned to have been contributed as aforesaid, and did thereby resolve, that a call of 125*l.* per share upon the shares in the capital stock of the said Company should be made, and that the same should be payable by the shareholders on the 20th day of October, 1842, at the banking-house of the bankers of the said Company. And that then, and long before the action first hereinafter next mentioned, the said board of directors did, more than one calendar month before the said 20th

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day of October, in the year of our Lord 1842, the day appointed for the payment of the said call, duly and in conformity with the provisions of the said indenture in that behalf, cause a letter to be sent by post to every shareholder, and among others to the said plaintiff, and thereby gave notice to such shareholders respectively, and amongst others to the said plaintiff, that the directors of the said Company had made the said call, and then and thereby specified the amount of the said instalment or call, and the time and place appointed for payment of the same as aforesaid. And the directors of the said Company did in and by the said circular letter so sent to the said plaintiff, then request such payment of the said call, at the time and place so appointed as aforesaid, and did then further state, that if the same should not be paid according to the said notice, interest would become due thereon, after the rate of 5*l.* per centum per annum, from the said 20th day of October, on the shares on which such instalment or call should at such time remain due and unpaid, and that such shares would cease to confer any privilege on the holder thereof, and that such share or shares, and all privileges and advantages thereunto belonging, would be liable to be forfeited. That afterwards, and after the expiration of the said month from the said circular letter, and after the said 20th day of October, in the year of our Lord 1842, and before this day, the said instalment or call not having been paid by the said plaintiff, according to his said covenant in that behalf in the said indenture contained, the said defendants, lately, to wit, on the 15th day of December, 1842, in the Court of Exchequer, before the Barons of the Exchequer, impleaded the said plaintiff, upon the said indenture and his covenants therein contained, as to the payment of the said instalment or call, and so therein and thereon proceeded, that they afterwards and before this day, and before the declaration of forfeiture hereinafter mentioned, in the said court, that is to say, in Easter

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Term in the 7th year of our reign, recovered against the said plaintiff, by the consideration and judgment of the said Barons of the Exchequer, a certain sum of 1341*l.* 12*s.*, for damages by the said now defendants sustained on occasion of the breach and non-performance by the said plaintiff of his said covenants in the said indenture contained, (so far as the same related to the said last mentioned instalment or call), and a certain sum of 131*l.* 13*s.* for the costs and charges by them in their suit in that behalf expended, whereof the said plaintiff was convicted, as by the record and proceedings thereof remaining in our said Court fully appears. That, after the recovery of the said judgment, to wit, on the 25th day of April, in the year of our Lord, 1844, the said defendants caused to be issued, out of the said Court of Exchequer, on the said judgment, a certain writ called a testatum fieri facias, (setting out the writ, a levy of 209*l.* 18*s.* parcel, &c., the return of the sheriff of nulla bona ultra, and the filing of the return), and the said sum of 209*l.* 18*s.* was then duly paid over to the attorney of the said defendants, in such part satisfaction as aforesaid of their said damages as aforesaid.

The writ then set out a further call, being the third, of 125*l.* per share, made on the 6th of June, 1843, in manner before stated; that the defendants had sued the plaintiff for the amount of such call, and had recovered judgment for 1343*l.* 15*s.*, and 146*l.* 6*s.* for costs, and proceeded: that, after the recovery of the said judgments, and after the expiration of one calendar month after the said 18th day of July, 1843, and before the said calls or the said judgments were paid or satisfied, the board of directors, in order to satisfy the arrears, declared the plaintiff's shares forfeited, and that a notice thereof was sent to the plaintiff, who thereupon ceased to be a member of the Company; that the directors had retained the forfeited shares in satisfaction of the calls and judgments; that the direc-

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tors, by forfeiting the shares, had satisfied all the calls and the plaintiff's liability, and yet the defendants intended to issue further executions. It concluded in the usual way (*a*). The declaration was a repetition of the writ, with the necessary averments.

To the declaration there were several pleas, to which the plaintiff demurred.

G. Pollock (with whom was *Rew*) appeared in support of the pleas, but the Court expressed a wish to hear the objections to the declaration in the first instance.

Peacock (with whom was *Phipson*), contrà (*b*).—[*Parke*, B.—The question on the declaration will be, what is the effect of a declaration of forfeiture of shares, in respect of which a judgment has already been recovered; which depends upon the construction of the deed. Could the shares be declared forfeited in respect of the non-payment of the last call, and the defendants be entitled to proceed on the judgment in respect of the first?] Then, what is the effect of a declaration of forfeiture after the judgment, according to the construction of the deed of settlement? The effect of the judgment was to extinguish the debt; the call would be merged in the specialty debt, and in case of death would have priority in the distribution of assets: Bac. Ab. tit. "Extinguishment," D.; *King* v. *Hoare* (*c*), *Thurman* v. *Wild* (*d*). The directors, therefore, had no right to declare the shares forfeited, and that act was a nullity. [*Parke*, B.—Clearly they could not do both, and the question is, when did they make their election?] The recovery of the judgment was a clear election. Supposing the plaintiff had satisfied the judgment, or paid all the calls except 1*s.*, could the directors then forfeit the shares? Surely not.

(*a*) See *Turner* v. *Davies*, 2 Wms. Saund. 137, n.

(*b*) Before *Pollock*, C.B., *Parke*, B., *Alderson*, B., and *Rolfe*, B.

(*c*) 13 M. & W. 494.

(*d*) 11 A. & E. 453.

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[*Pollock*, C. B.—You assume that the forfeiture was since the judgment.] The writ states so, and it would not be a good writ if it were not so. If the directors had forfeited the shares before the action, that would have been a good defence. The effect of the declaration of forfeiture could not be greater than a release—(Vin. Abr. tit. "Auditâ Querelâ," N. 3, Sec. 8; Bac. Abr. tit. "Auditâ Querelâ," B. p. 247)—and if the plaintiff succeeds in this declaration, he will be entitled to a return of what has been levied, including costs, to which he cannot be entitled.

G. Pollock, in support of the declaration.—It is conceded that the defendant is not entitled to restitution, but he is entitled to relief from further execution. [*Rolfe*, B.—If you admit that you are not entitled to restitution, are you entitled to an auditâ querelâ at all?] Yes, because, suppose a recovery against two, and a levy of part from one, and more than the residue from the other, then the latter would be entitled to an auditâ querelâ to recover back the surplus. [*Pollock*, C. B.—It is said, that, after the recovery of the judgment, the directors could not declare the shares forfeited; that the effect of the judgment is, that the debt is satisfied and extinguished, and that the directors could not afterwards declare the shares forfeited; and that the plaintiff is still entitled to his shares. The question is upon the construction of the deed.] The deed empowers the directors to declare the shares forfeited "at any time." [*Alderson*, B.—That is, for calls remaining unpaid; and Mr. *Peacock's* argument is, that judgment is equal to payment. *Parke*, B.—In truth, all turns on the construction of the deed. Mr. *Peacock* says that there are two answers—first, that the judgment has put an end to the matter; and, secondly, that the directors may declare the shares forfeited, or sue, and that here they have elected by judgment and execution.] But the deed empowers the directors to declare the shares forfeited after judgment. [He cited

Turner v. *Davies* (*a*); 3 Bl. Com. 406; *Ognel* v. *Randols* (*b*).]

Cur. adv. vult.

Nov. 20th.

POLLOCK, C. B.—The parties in this case having consented that the questions arising on the pleas should not be the subject of our consideration, but that we should confine the judgment of the Court to the question, whether the declaration be good or bad, I am to pronounce the judgment of the Court in favour of the defendants in auditâ querelâ, upon the ground that the declaration cannot be sustained. Upon looking at the terms of the deed, under which the Company was established, it appears that they have power either to sue or to declare the shares forfeited in respect of which there was a neglect to pay calls; and we entirely go along with the plaintiff's argument, that it was not competent for the Company to do both. They could not enforce the calls by action, and at the same time declare forfeited, the shares, so as to authorize a sale of them; and the question is, what is the effect of an action upon a call, followed up by a declaration that the shares are forfeited? On the part of the plaintiff it is contended, that the effect of the judgment, followed up by a declaration of forfeiture, is, that the latter is an abandonment of the former, and so he is entitled to the relief he seeks, and to succeed upon the auditâ querelâ; whilst, on the part of the defendants, it is contended that they cannot both sue and declare the shares forfeited, and having sued, they have elected between the two remedies, and therefore that the declaration of forfeiture is a nullity; and we are of that opinion. The terms of the deed are these:—"That, on the neglect or refusal of any shareholder to pay the sum of 125*l.* per share within one calendar month after notice from the board of directors, together with such interest, if any, as the board shall think fit, not

(*a*) 2 Sand. Rep. 147. (*b*) Cro. Jac. 29.

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exceeding 5*l.* per cent. from the date of the indenture, or upon the neglect or refusal of any shareholder to pay any further instalment or call for or upon his share or shares in the said capital, on or before the day appointed for payment, or within one calendar month after such day, then, and in either of such cases, the party so neglecting or refusing shall, in respect of every share as to which there shall have been such neglect or refusal, cease to have any right to or to exercise any of the privileges of, a shareholder until he shall have paid the full amount due in respect of such share, together with such further sum, if any, by way of interest or fine thereon, as may be determined upon by the board of directors, under the provisions therein contained; and that it shall be lawful for the said board of directors, at any time after the expiration of such respective one calendar month, either to apportion such sum as they may think just, by way of interest or fine on the amount so due, or every such sum as shall be paid by way of interest or fine, according to the delay in payment thereof, and to limit a day for the payment of such interest and apportion the same, and to declare, in default of payment thereof on or before such day so limited, the shares in respect to which such default shall be made shall thenceforth be absolutely forfeited." It was contended, that the words, "at any time after," gave the directors a power to declare the shares forfeited, notwithstanding there might have been in the meantime an action commenced, and a judgment recovered for the amount of the call and interest. We are of opinion, that this is not the true construction of the deed, with reference to that part. It continues—"Or it shall be in the discretion of the board at once to declare that such shares as to which the full amount shall not have been paid shall thenceforth be forfeited to the Company." This part clearly shews, that the two powers were put alternatively, and that the Company could not have the benefit of both, but must confine them-

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selves to one or the other. Further on in the deed it is provided, "That it shall be lawful for the board of directors, if they shall think fit, to enforce the payment of the amount due in respect of the said sum of 125*l.* per share, or to become due in respect of any such further instalment or call, with interest, from any person who shall make default in the payment of the same, *instead of declaring forfeited* any shares on which such amount of such instalment shall have been unpaid as aforesaid." This makes it more clear still, that the directors may either sue, or, instead of suing, they may declare the shares forfeited; and we are of opinion that they could not do both.

Without saying what the effect of an abandonment of an action for calls before judgment, and a declaration of forfeiture would be, we are of opinion that the proceeding to judgment and execution by the directors is a clear election of their remedy, and that they could not afterwards proceed to declare the shares forfeited; and that the declaration that they were forfeited is a mere nullity. Upon this view the plaintiff has no right to come here to be relieved from the effect of the judgments. We pronounce no opinion on the pleas.

Judgment for the defendants.

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BAIL COURT.

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Jan. 31*st.* *In re* An Inquiry of Damages and Compensation under the Lands Clauses Consolidation Act, 1845, *Between* WILLIAM ROSS *and* THE YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY.

The power of settling costs, given to the Master by the 52nd section of the Lands Clauses Consolidation Act, (8 & 9 Vict. c. 18,) invests him with the character of an original arbitrator, and there is no review of his decision.

THE rule in this case called upon the Railway Company to shew cause why the Master should not be at liberty to review his taxation of costs herein.

It appeared that the Company, requiring certain premises belonging to Mr. Ross, for the purposes of their line, gave notice to him on the 24th of April, 1848, of their intention to cause a jury to be summoned to assess the compensation to be made to him. They therein stated, that, in pursuance of the 38th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, they were willing to give the sum of 52*l.* 2*s.* for his interest in the premises. On the 8th of May following, the Company caused a warrant to be served on the Sheriff of Newcastle-upon-Tyne, requiring him to summon a jury; and the Sheriff having subsequently appointed the 29th of May for holding the inquiry, on the 15th of May the requisite notice of such appointment was served on Mr. Ross. On that day, immediately after the service of the notice, a conference took place between Mr. Ross, his attorney Mr. Preston, Mr. Gutch the Company's attorney, and Mr. Dobson an architect and agent employed by the Company, with a view to an amicable settlement, when Gutch and Dobson, on behalf of the Company, made a verbal offer to Mr. Ross of 1000*l.* for his interest in the property, which Mr. Ross refused, demanding 1050*l.*

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On the 16th of May, the following written offer, on behalf of the Company, was delivered to Mr. Ross:—

"Mr. William Ross,—With a view of settling the question of your compensation, we have obtained authority from the Directors of the York, Newcastle, and Berwick Railway Company, to offer you 1000*l.* in full for all your interest in the property, and for all compensation and damage you may be entitled to from the Company. At the same time, we beg to state, that this sum is considerably above our estimate of what you are entitled to; and we only make the offer in order to avoid going before a jury; and in case you still determine to take us there, the costs you may incur by so doing may fall on yourself, if a less sum than the above offer be awarded you by them.

"We are yours obediently,

"RICHARDSON & GUTCH."

"May 16th, 1848."

Ross refused the sum offered, and the Company proceeded with the inquiry before the Sheriff, when the jury assessed the damage of the claimant at 1000*l.*—the claimant's counsel using the above document as evidence of an offer to that amount. The Company had paid the whole of the costs of summoning, impanneling, and returning the jury, &c., and costs were subsequently submitted to the Master for taxation. With a view to raise the question in dispute in the most simple form, the Master declined either to allow any costs to the claimant, or to order him to repay to the Company half the costs of summoning, &c., the jury.

Temple shewed cause (*a*).—The Court has no jurisdiction in this case. This is a taxation under the 52nd section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18 (*b*), which appoints the Master as an original arbitrator,

(*a*) Before *Erle*, J.

(*b*) The following are the material sections upon which the argument turned:—Sect. 38. That

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and gives no power whatever to this Court; and the only mode of reviewing his decision is by treating it as an award, of making it a rule of court, and then moving to set it aside: 1 Wms. Saund. 327 *e*, n. (*s*). But if this Court has jurisdiction, the Master was right in refusing to allow the claimant any costs, the sum assessed by the verdict having been previously offered by the promoters. It may, however, be said, that, as the offer was not made till after the warrant for summoning the jury had been issued, that that sum had not been previously offered, within the meaning of the section. The words "previously offered" mean,

"before the promoters of the undertaking shall issue their warrant for summoning a jury for settling any case of disputed compensation, they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned; and in such notice the promoters of the undertaking shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and for the damage to be sustained by them by the execution of the works."

The 51st section enacts, that "on every such inquiry before a jury, where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of such inquiry shall be borne by the promoters of the undertaking; but if the verdict of the jury be given for the same, or a less sum than the sum previously offered by the promoters of the undertaking, or if the owner of the lands shall have failed to appear at the time and place appointed for the inquiry, having received due notice thereof, one-half of the costs of summoning, impanneling, and returning the jury, and of taking the inquiry and recording the verdict and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the other half by the promoters of the undertaking; and each party shall bear his own costs, other than as aforesaid incident to such inquiry."

Section 52 enacts, that "the costs of any such inquiry shall, in case of difference, be settled by one of the Masters of the Court of Queen's Bench of England or Ireland, according as the lands are situate, on the application of either party, and such costs shall include all reasonable costs, charges, and expenses, incurred in summoning, impanneling, and returning the jury, taking the inquiry, the attendance of witnesses, the employment of counsel and attornies, recording the verdict and judgment thereon, and otherwise incident to such inquiry."

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previous to the inquiry. Statutes giving costs ought to be construed strictly: *Dibben* v. *Cooke* (*a*); *Ingle* v. *Wordsworth* (*b*). And any offer made before the inquiry, is "a sum previously offered" within that section.

Granger, in support of the rule.—The Legislature, in naming the Master as the taxing officer, intended that a taxation under the statute should have all the incidents of an ordinary taxation in the Courts of law; but if not, the words "previously offered," in the 51st section, mean previous to the institution of the proceedings for summoning the jury. If this be not the construction, a railway company might insert a mere nominal sum in the notice given under section 38, and then proceed with the inquiry, and at the last moment make a reasonable offer, which would expose the claimant to a moiety of the expenses of the inquiry, and all his own costs.

Cur. adv. vult.

Feb. 24th.

The written judgment of *Erle*, J., was delivered by *Wightman*, J.

ERLE, J.—In this case, a rule for the Master to review the taxation of costs under 8 & 9 Vict. c. 18, ss. 51 and 52, was moved for, on the ground that the Master was mistaken in disallowing costs, by reason of an offer of the sum found by the jury having been made, such offer being alleged to be of no avail, being made too late. A preliminary objection was taken in answer, namely, that the reference is to the Master as an original arbitrator, and that the Court has no power to review the decision of the Master upon a matter so referred to him; and it appears to me, that this objection must prevail, and that the prin-

(*a*) 2 Str. 1005. (*b*) 3 Burr. 1284.

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ciple of *Morgan* v. *Smith* (*a*) applies. Where the Court refers the taxation to its officer, it has the power of reviewing it, because the power of the officer is delegated to him by the Court, and his act is not effective unless adopted by the Court. But the taxation in question is made without any delegation of power from the Court, and without any express or implied liability to review. Where the Legislature intended the Court to have the control over the taxation, it has directed such Court to award costs. See section 80 as to costs, where the money has been deposited; section 83 as to costs of conveyances; section 126 as to costs of litigating a title. The rule must therefore be discharged, but without costs, as the substantial right appears to me to be with the claimant.

Rule discharged, without costs.

(*a*) 9 M. & W. 427.

BAIL COURT.

Hilary Term, 1849.

Jan. 22*nd*.
Feb. 24*th*.

In the Matter of the Arbitration *Between* THE LONDON AND NORTH WESTERN RAILWAY COMPANY *and* JAMES BRANNAN QUICK.

On a submission to arbitration under the Lands Clauses Consolidation Act, it is the duty of the umpire, under the 34th section, to ascertain whether the claimant's right to costs arises, and of including them in his award, if it exists. He has no power to grant a subsequent certificate for them.

THIS was a rule calling upon the Company to shew cause why they should not pay to J. B. Quick 32*l*. 2*s*. 4*d*., his costs of the arbitration, and incident thereto, pursuant to the rule, certificate, and award made herein between the parties; and why they should not pay the costs of this

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application, to be taxed by one of the Masters. From the affidavits it appeared, that Mr. Quick, having a leasehold interest in premises on the Company's line, and claiming compensation in respect of damage done by the alteration of the level of a road to his premises, applied to them for compensation. The Company declined admitting any liability. Mr. Quick thereupon gave the requisite notices, desiring to have the same settled by arbitration, under the Lands Clauses Consolidation Act, the 8 & 9 Vict. c. 18, and appointed Mr. Lockyer as his arbitrator, and the Company afterwards appointed their arbitrator. Their appointment, after reciting, amongst other things, his (Mr. Quick's) claim of 250*l.* for the alleged injury, proceeded—"Now the London and North Western Railway Company, denying and protesting against such claim and every part thereof, and so far only as they are bound and required by any act or acts of Parliament so to do, do hereby appoint J. H. to arbitrate upon such claim of the said J. B. Quick, so far only as the same is bound and required to be settled by arbitration, by or under any statute or statutes in that behalf, but no further or otherwise." The arbitrators not agreeing in the appointment of an umpire, and application being made by Mr. Quick to the Commissioners of Railways, under the Lands Clauses Consolidation Act, to appoint an umpire to decide upon the matter, they, on the 19th of February, 1848, appointed G. Powell as umpire. The time allowed for the arbitrators to make their award having expired, the umpire proceeded alone with the reference.

On the 8th of April he made his umpirage, which, after reciting the Company's act, and that it was thereby enacted, that the Company should, at their own cost and charges, make and keep in repair the road in question, and that J. B. Quick had served on the Company a notice, claiming 520*l.* by reason of the road in front of his premises having been raised by the Company above the for-

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mer level, and that it was his wish to have his claim settled by arbitration, and that J. B. Quick had appointed J. L. arbitrator on his behalf, and the Company had appointed J. H. arbitrator on their behalf, and that, the arbitrators having neglected to appoint an umpire, the said J. B. Quick had made application to the Commissioners of Railways to appoint an umpire, in pursuance of the Lands Clauses Consolidation Act, 1845, and that they had appointed G. P., proceeded—"Now, I, the said G. P., as such umpire, having taken upon myself the burthen," &c. "do award, decide, and determine, that the said Company shall pay to the said J. B. Quick, his executors or assigns, the sum of 51*l.* 10*s.* as and for full compensation for all damage and detriment sustained by him, the said J. B. Quick, in respect of the matters so referred to me, or by the exercise by the said Company of the powers contained in the said acts or either of them; and I do hereby settle the costs of, and incident to, my umpirage and award, including the costs of the said J. Lockyer, at 36*l.* 13*s.* 6*d.*, which sum is to be paid according to the provisions contained in the Lands Clauses Consolidation Act, 1845."

The Company duly paid the sum of 51*l.* 10*s.* awarded as compensation, and also the sum of 36*l.* 13*s.* 6*d.* as the costs of Mr. Quick's umpire. On the 11th of May, they were served with an appointment to attend before the umpire on the 13th, to settle the amount of Mr. Quick's costs; but they refused to attend, and gave notice to the umpire, protesting against his taking any further steps in the matter. On the day named, the umpire proceeded to settle the costs incurred by Mr. Quick (no one attending on behalf of the Company), and gave a certificate as follows:—

"I hereby certify, that I have settled the costs of the above claimant of this arbitration, and incident thereto, at 32*l.* 2*s.* 4*d.*

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The Company refused to pay the amount.

Bovill (with whom was Sir *Fitzroy Kelly*) shewed cause (*a*). The question is, what is the mode of proceeding to ascertain the costs incident to arbitration, where arbitrators appointed under the 8 & 9 Vict. c. 18, award a larger sum by way of compensation than shall have been offered by the promoters of a railway company under the 34th section (*b*). Here the umpire has made his award, directing the Company to pay the sum of 51*l.* 10*s.* by way of compensation, and settling the costs, and incident "to my umpirage and award, including the costs of the said James Lockyer, the arbitrator appointed for and on behalf of the said James Brannan Quick, at the sum of 36*l.* 13*s.* 6*d.*, which is to be paid according to the provisions contained in the Lands Clauses Consolidation Act, 1845." Subsequently, the umpire made a certificate settling the amount of costs of the above claimant, of the arbitration and incident thereto, at 32*l.* 2*s.* 4*d.*, which it is sought to enforce by the present rule. First, there are no sufficient materials to support this rule, which is founded on the 1 & 2 Vict. c. 110, s. 18. The certificate is a mere statement of the amount of the costs, and there is no direction who is to pay them. The liability of the Company to these costs depends upon—whether the arbitrator has awarded the same or a less sum than that offered by the promoters, which can appear only by the affidavits; and inasmuch as the liability of the Company to pay does not appear upon the face of the award, this Court will not

(*a*) Before *Erle*, J.

(*b*) Which enacts, that "all the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking; in which case, each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions."

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interfere. Secondly, the proper course for the umpire to pursue, under the 34th section, was, as soon as he had determined upon the sum to be awarded, to inquire whether it was greater than or equal to the sum offered; and if it was, then to have settled the costs of the claimant, and to have included them in his award; he had no power subsequently to grant a certificate for them, as he was then functus officio. The statute gives him no such power: *Gordon* v. *Mitchell* (*a*); *Ward* v. *Dean* (*b*); *Morgan* v. *Smith* (*c*); *Anon.* (*d*); *Hagger* v. *Baker* (*e*). There is nothing here that can be made a rule of court, out of which a liability to pay can arise, as the certificate only fixes the amount. The 67th section places the costs in the discretion of the arbitrators, where they award a less or an equal amount to the sum deposited. Under this section they must, it is submitted, direct their payment by the award; and, by analogy, the same course ought to have been pursued under the 34th section.

Watson and *Hoggins*, in support of the rule.—There is no doubt that Mr. Quick is entitled to these costs, and the only way in which they can be awarded is by a separate document; for, until the award is made, it cannot be ascertained whether the sum awarded equals or exceeds the sum offered. In the ordinary case of awards, where the costs are taxed by one of the Masters, it would be impossible to tax the costs before the award is made: and so here; and Parliament has substituted the umpire for the Master. By the 36th section the submission may be made a rule of court. It is, in point of fact, merely the nomination, on either side, of an arbitrator, and so the provisions of the statute are incorporated in the submission; so that it is as if the Company had agreed in the submission to pay the

(*a*) 3 B. Moore, 241.
(*b*) 3 B. & Ad. 234.
(*c*) 9 M. & W. 427.
(*d*) 1 Chit. 38.
(*e*) 14 M. & W. 9.

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amount of costs to be settled by the umpire, if he should award a greater amount than that offered; and the certificate settling the costs shews that he has so found. *Morgan* v. *Smith* (*a*) was the case of an ordinary reference, and is not applicable. When the submission has been made a rule of court, it may be enforced as other rules of court. Sect. 27 shows by implication that the award may be treated like any other award; and the 36th sect., in enacting that the submission might be made a rule of court, must have intended that all the incidents thereto should attach. [*Erle*, J.—When is the umpire to settle the costs? Suppose he was to make his award on the last day limited for that purpose, you must contend that he may afterwards on a subsequent day settle the costs.] It is submitted, that he may. Here he is a ministerial umpire, and retains his functions till all the powers conferred upon him by the statute are fulfilled: *Great North of England and Junction Railway Company* v. *Clarence Railway Company* (*b*); *Barker* v. *North Stafford Railway Company* (*c*); and his duty, under the 34th section, was, if the Company had not tendered a greater or equivalent sum to that awarded, so to find and then to settle the costs.

Cur. adv. vult.

Feb. 24*th*.

ERLE, J. (*d*).—In this case the claimant applied for a rule on the Company to pay his costs of an arbitration, on affidavits stating by implication that the sum awarded was greater than any sum previously offered, and that the umpire had by a certificate settled the amount of such costs; and he contended, that the provisions relating to arbitration were the terms of a submission under the

(*a*) 9 M. & W., 427.

(*b*) Ante, Vol. 3, p. 605; *S. C.*, 1 Coll. 507.

(*c*) Ante, p. 401.

(*d*) The written judgment of *Erle*, J., was delivered by *Wightman*, J.

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tion for the damage by severance, and for other injuries sustained by the claimant being assessed in one sum of 2560*l.*; whereas the sum to be paid for the land, the sum to be paid as compensation for severance, and the sum to be paid as compensation for other injuries, should each have been assessed and awarded separately.

Secondly.—That the award was not according to, nor warranted by, the claim upon which the umpire professed to adjudicate, in this, that the umpire has awarded a sum for the value of the land, and for the immediate possession thereof; whereas, it appeared by the claim and the proceedings that the claimant had not possession and could not give such immediate possession, but that part of the land was in the occupation of J. Baum, under a lease expiring in 1850; and that other part of the land so to be taken was in the occupation of J. Low, as tenant thereof.

Thirdly.—That the umpire exceeded his authority in awarding a sum of money to be paid (inter alia) for the immediate possession of the said land.

Fourthly.—That the umpire received evidence and statements not upon oath.

Fifthly.—That he decided contrary to all the evidence before him.

Sixthly.—That the declarations of the arbitrators and umpire respectively were not made in due time.

Seventhly.—That the umpire was not properly and legally appointed, and that the award was made after the umpire's authority had ceased.

Eighthly.—That the award was not certain nor final.

Ninthly.—That the Board of Trade had no authority to appoint an umpire.

From the affidavits it appeared that the claimant, William Bradshaw, being seised in fee of an estate at Hackney Wick, was, on the 3rd of November, 1846, served with a notice from the Company that they required, and were willing to treat for, his estate and interest in the

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land, &c. described in the notice, and calling upon him for the particulars of his estate and interest therein. On the 21st of December following, Mr. Bradshaw sent in his claim to the Company, "for the land described in the notice of the Company, (being a portion of ten acres, which would be wholly destroyed for building purposes), and for injury and damage to the residue of the ten acres by reason of severance, the sum of 17,325*l.*, subject to a deduction for the value of the land destroyed for building purposes, which might not be required by the Company." He also claimed, as the value of the manor-house, garden, &c., in the occupation of J. Baum, 1500*l.*, and for the stabling, 750*l.* He also claimed to be paid for any injury he might otherwise sustain, and all costs, &c. and compensation for being dispossessed of his estate: he further stated, that he desired to have his claim settled by arbitration, under the Lands Clauses Consolidation Act, 1845. The Company accordingly, on the 23rd of March, 1847, appointed Mr. Fuller as their arbitrator, of which they, on the 25th of March, gave the claimant notice; and on the 6th of April the claimant appointed Mr. Gadsden as his arbitrator. Of this appointment the claimant gave notice to the Company, stating, "that the matters required to be referred to arbitration were as follows:—viz., to settle the amount of compensation to be paid to me by the said Company for the fee-simple in possession of and in the land, farmhouse, yard, and cowshed in the occupation of J. Low; the manor-house, garden, and out-buildings, the stabling, out-buildings, and yard, in the occupation of J. Baum, which said manor-house are subject to a lease thereof granted to the said J. Baum for a term of years which will expire at Michaelmas, 1850, at a yearly rent of 38*l.*, all which said premises are described or referred to in my aforesaid claim, and for injury and damage," &c.

The arbitrators having neglected to appoint an umpire, and to enter on the matters referred, both parties, before

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the 29th of April, joined in applying to the Board of Trade to appoint an umpire. On the 29th of April the claimant objected to the appointment of any umpire not a barrister. The Company afterwards made a request to the arbitrators, and, after seven days, another application to the Board of Trade, who, on the 17th of May, appointed Mr. Powell, a surveyor, to be the umpire. On the 27th of May, the arbitrators and umpire made the declarations required by sect. 33, and commenced the inquiry on that day by going over the estate, accompanied by the Company's surveyor and that of the claimant, and made inquiries as to the situation and character of the land, but not as to the value; this was objected to, on behalf of the claimant, at the time, on the ground that such evidence was not upon oath. On the 5th of June, the parties attended before the arbitrators and umpire, when witnesses were examined; the hearing was postponed to the 9th of June, when the inquiry terminated; and on the 26th of July, the award of Mr. Powell was forwarded to the claimant, which assessed the claimant's compensation at 2560*l.* It stated, that that sum was given by way of compensation for the absolute purchase of the fee-simple in possession, free from incumbrances (except the tithe commutation rent-charge), of the land taken, and also for the immediate possession thereof; and also for all damage, by reason of severing or otherwise, injuriously affecting the lands of the claimant.

The *Attorney-General* (Sir *J. Jervis*), Sir *F. Kelly*, and *Cowling*, shewed cause (*a*).—As to the first objection, the 49th sect. applies to verdicts by juries, and not to awards (*b*);

(*a*) Before Lord *Denman*, C. J., *Patteson*, J., *Wightman*, J., and *Erle*, J.

A preliminary objection was made, that the award had not been made a rule of court, but only the submission to the arbitrators; the Court, however, decided, that the effect of the statute was, that the umpire was appointed by the original submission: therefore, that it was sufficient.

(*b*) See the material sections of the statute at the end of the case.

but if it does, the statute is directory only: *Corrigal* v. *The London and Blackwall Railway Company* (*a*), *In re The London and Greenwich Railway Company* (*b*). As to the second objection, the umpire has awarded for what is claimed by the notice of Mr. Bradshaw—the fee-simple and possession; but he is not the person to complain, if he has got more than he is entitled to. However, this is mere matter of form, and cured by sect. 37. The third objection is the same as the second. The fourth objection is answered by the affidavits. As to the fifth objection, that is one that the Court will not entertain. As to the sixth, there is no ground for it, as the declaration was made before the umpire commenced on the reference. The seventh, eighth, and ninth objections refer to the legality of the appointment of the arbitrator, and the time of the making his award. The Board of Trade, under sect. 28, had the power of appointing the umpire, and his award was clearly made in time. The three months in sect. 23 runs from the duty devolving on the parties; so that the arbitrators and umpire had each three months after their appointments to make their award: *Skerratt* v. *The North Staffordshire Railway Company* (*c*), *Reade* v. *Dutton* (*d*). There is no report of the case of *Re The Great North of England Railway Company* (*e*), relied on by the other side, and therefore it is impossible to say what the facts of that case were. [*Patteson*, J.—From my note of that case it would appear, that there the award was made more than three months after the appointment of the arbitrator; but it did not appear that the appointment was brought to his notice more than three months before he made his award, and I

(*a*) Ante, Vol. 3, p. 411; *S. C.*, 5 M. & Gr. 219.

(*b*) 2 A. & E. 678.

(*c*) Ante, p. 166; *S. C.*, 2 Phil. 475.

(*d*) 2 M. & W. 69.

(*e*) Bail Court, Michaelmas Term, 1847, in which *Martin*, *Bliss*, and *Hugh Hill* were engaged.

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thought that that circumstance did not make any difference.] They cited *Cock* v. *Gent* (*a*), and *Doe* d. *Turnbull* v. *Brown* (*b*).

Butt and *Hugh Hill*, contra.—The arbitrators are to discharge the duties of a jury, and those duties are clearly pointed out by sect. 49; the award, therefore, ought to have separately assessed the value of Baum's interest. The Board of Trade had no power to appoint an umpire. The powers of the arbitrators ceased after twenty-one days from the last appointment (sect. 31); and the 27th and 28th sections contemplate the existence of arbitrators and the appointment of an umpire, to decide on the matters on which they differ. Inasmuch, therefore, as there were no arbitrators in existence, and no matters on which they differed, the Board of Trade had no power to appoint an umpire. The umpire received statements not on oath. [Lord *Denman*, C. J.—The receiving evidence appears to be merely the talking over some of the matters referred.] The Court will not draw any distinction between the importance of the matters communicated: *Dobson* v. *Groves* (*c*).

Cur. adv. vult.

Lord DENMAN, C. J.—In this case several objections were made against the award of the umpire. First, that one sum was awarded for damage and price, instead of a separate sum on each account. The answer is, that, in respect of arbitration, there is no requirement in the statute for separate assessments; and that, in respect of verdicts upon inquisitions, such requirements as are in s. 49 of the present statute are directory, and not conditional: *In re The London & Greenwich Railway Company; Corrigall* v. *London & Blackwall Railway Company.* Secondly and thirdly, that the award assumes the claimant to be in pos-

(*a*) 13 M. & W. 364. (*b*) 5 B. & C. 384. (*c*) 6 Q. B. Rep. 637.

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session. The answer is, that such assumption, if actually made, is in his favour and to his advantage, and, therefore, no matter of complaint for him. But it does not appear clearly that any such assumption was made. The expression, "fee-simple in possession," in the claim, is used in contradistinction to "fee-simple in reversion or remainder." The compensation given can only be taken to be in respect of what was claimed; and, if the tenants have any claim in respect of the actual possession of the land, their remedy is against the Company, and not against the owner of the fee. Fourthly, fifthly, and eighthly, that the umpire received statements not on oath, and that he decided contrary to the evidence, and that the award is not final. But the proof of these assertions fails; and, with respect to the fifth objection, even if the decision had been contrary to the evidence, that would not be any ground for the interference of this Court. As to the sixth, seventh, and ninth objections against the appointment of the umpire by the Board of Trade, the time of his declaration, and the time of making his award, the facts appear to be; that the Company appointed their arbitrator on the 23rd of March, 1847, and the claimant his on the 6th of April; these arbitrators did not appoint an umpire or enter on the matters referred, and both parties, before the 29th of April, joined in applying to the Board of Trade to appoint an umpire. On the 29th of April the claimant objected to the appointment of any umpire not a barrister. The Company afterwards made a request to the arbitrators, and after seven days another application to the Board of Trade, who, on the 17th of May, appointed a surveyor to be the umpire; and he made his declaration on the 27th of May, and his award on the 26th of July.

Upon these facts the objections are, that the appointment of an umpire must be completed within twenty-one days, and the award of the umpire made within three months after the appointment of the arbitrators; that

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their appointment was complete on the 6th of April; and that, consequently, the appointment of the umpire on the 17th of May, and the making of the award on the 26th of July, were too late. But it appears to us, that the powers given for arbitration continue for three months after the arbitrators are appointed, and are determined then only sect. 23, enacting (*a*) that the question shall be settled by

(*a*) Sect. 23. "If the compensation claimed or offered, in any such case, shall exceed 50*l*., and if the party claiming compensation desire to have the same settled by arbitration, and signify such desire by notice in writing to the promoters of the undertaking before they have issued their warrant to the sheriff to summon a jury in respect of such lands, under the provisions hereinafter contained, stating in such notice the nature of the interest in respect of which such party claims compensation, and the amount of the compensation so claimed, the same shall be so settled accordingly; but unless the party claiming compensation shall, as aforesaid, signify his desire to have the question of such compensation settled by arbitration, or if, when the matter shall have been referred to arbitration, the arbitrators or their umpire shall, for three months, have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury, as hereinafter provided."

Sect. 27. "Where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special act; and if such umpire shall die, or become incapable to act, they shall forthwith, after such death or incapacity, appoint another umpire in his place, and the decision of every such umpire, on the matters so referred to him, shall be final."

Sect. 28. "If, in either of the cases aforesaid, the said arbitrators shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, the Board of Trade, in any case in which a railway company shall be one party to the arbitration, and two justices in any other case, shall, on the application of either party to such arbitration, appoint an umpire, and the decision of such umpire, on the matters on which the arbitrators shall differ, or which shall be referred to him, under this or the special act, shall be final."

Sect. 31. "If where more than one arbitrator shall have been

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a jury, if, when the matter shall have been referred to arbitration, the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made. That the 31st section, providing that the umpire shall determine where either of the arbitrators refuses or neglects to act, and they fail for twenty-one days from their appointment to make their award, operates only to take from the arbitrators the power of making an award, and to vest that power in the umpire, but not to render void the submission to arbitration, and the other powers incidental thereto, such as the appointment of an umpire. The statute contemplates three cases where a single arbitrator is to award, and in each of those cases, he has three months for the purpose, viz. where a single arbitrator is originally appointed, under sect. 25, or a vacancy is left unsupplied, under sect. 26, or one of the two refuses or neglects to act, under sect. 30. It is to be observed, that the umpire cannot be brought into action in either of these cases. Then sect. 31 provides for two

appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within such extended time (if any) as shall have been appointed for that purpose by both such arbitrators, under their hands, the matters referred to them shall be determined by the umpire to be appointed as aforesaid."

Sect. 49. "Where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to the lands held therewith, the jury shall deliver their verdict separately for the sum of money to be paid for the purchase of the lands required for the works, or of any interest therein belonging to the party with whom the question of disputed compensation shall have arisen, or which, under the provisions herein contained, he is enabled to sell or convey, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owners, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special act, or any act incorporated therewith."

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arbitrators acting and failing to award; if they so fail for twenty-one days, and do not extend their time, the power to award is taken from them and vested in such umpire as is duly appointed under the other provisions of the statute which are not affected by this section. The incapacity to make an award has no effect upon the power given to the arbitrators under sect. 27, and to the Board of Trade on their default, under sect. 28, to appoint a new umpire in case of the death or failure of the first; and we see no reason why the same incapacity to award should have any effect upon the powers given for appointing the original umpire. If the construction contended for by the claimant is correct, it might happen, that, at the end of twenty-one days, the power to award might cease, and the power to resort to a jury still be suspended for the residue of three months, which would be a delay without purpose. On these grounds, we have come to the conclusion that the appointment of the umpire was valid. There appears no foundation for the objection, that the umpire did not make his declaration in time, as he was appointed on the 17th of May, and made it on the 27th before he entered on the matters referred. The remaining objection is, that the award of the umpire is too late, there being more than three months between the appointment of the arbitrator and his award. But we find it decided, in *Ex parte Skerratt* v. *The North Staffordshire Railway Company*, that the three months for the umpire commences from the duty devolving upon him. In this decision we fully concur, and as this award of the umpire was made within three months from the duty devolving upon him, and, indeed, within three months from his appointment, it is not too late. The rule, therefore, must be discharged, with costs.

Rule discharged.

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COURT OF COMMON PLEAS.

Hilary Term, 1848.

Nov. 17*th*, 1847.
May 12*th*, 1848.

OWEN *v.* CHALLIS.

Assumpsit for money had and received. Plea, that the defendant and others were members of the provisional committee of an undertaking for making a railway; that twenty shares were allotted to the plaintiff; and that the defendant received from him 2*l.* 12*s.* 6*d.* on each share, amounting to 52*l.* 10*s.* That the plaintiff sought to recover back the said sum of 52*l.* 10*s.*, on the ground that the scheme had not been prosecuted within a reasonable time; that, after the passing of the 8 & 9 Vict. c. 28, it was, at a meeting held under that act, resolved, that the undertaking should be abandoned,

ASSUMPSIT for money had and received, and on an account stated. Plea, as to 52*l.* 10*s.*, parcel &c., that, before the passing of the 9 & 10 Vict. c. 28, intituled, "An Act to facilitate the dissolution of certain Railway Companies," a prospectus had been issued for the promotion of a certain intended partnership, for carrying into effect an undertaking for constructing a railway, to be called "The Direct Western Railway," which could not be constructed without the authority of Parliament, and that no act had been obtained for that purpose; that, by the said prospectus, the defendant, and several other persons named, were declared to be a provisional committee; and it was also declared, that the capital should consist of 300,000*l.*, divided into 120,000 shares of 25*l.* each, and that the allottees of such shares should pay 2*l.* 12*s.* 6*d.* on each share allotted to them. That the defendant and the other members of the provisional committee were also the managers of the undertaking; that the plaintiff became a subscriber for twenty shares, which were allotted to him; and that the defendant and the other members of the committee received 2*l.* 12*s.* 6*d.* from the plaintiff in respect of each of such shares, amounting in all to 52*l.* 10*s.* That the plaintiff, the defendant, and the other shareholders, then entered into an agreement for the formation of a partnership for carrying on the undertaking; and that the plaintiff sought to recover the 52*l.* 10*s.* because the scheme was

and its affairs wound up; that the plaintiff's claim in this action was part of the affairs of the Company to be wound up; and that they had not been wound up, nor had a reasonable time for that purpose elapsed:—*Held*, bad on special demurrer, as amounting to non assumpsit.

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not prosecuted for a time, which the plaintiff alleged to be unreasonable. The plea then went on to state, that, after the passing of the statute 9 & 10 Vict. c. 28, the committee made the proper returns under that act, and called a meeting and an adjourned meeting, according to its provisions; at which latter meeting the Company and partnership was, according to the act, dissolved, and the prosecution of the undertaking abandoned and discontinued; and thereupon, and by force of the statute, the affairs of the Company became liable to be wound up, according to the rules applicable to partnerships dissolved by mutual consent of all the partners; and that the said sum of 52*l.* 10*s.* became subject to the resolution for dissolving the Company; and that the plaintiff's claim in this action was part of the affairs of the Company, to be wound up as aforesaid; and that, at the commencement of the suit, the affairs of the Company had not been wound up, nor had a reasonable time elapsed for winding up the same. Verification.—To this plea the plaintiff demurred on various grounds, and among others, that the plea amounted to non-assumpsit.

Pigott, in support of the demurrer (*a*).—Assuming that the 9 & 10 Vict. c. 28, affords an answer to the present demand, the plea is bad, as amounting to the general issue; for the defence set up is, that the defendants never had in their hands money to the use of the plaintiff, payable on request.

Willis, contrà.—The plea assumes that the plaintiff had a good cause of action before the passing of the act, and sets up the statute as matter of avoidance. It does not, therefore, amount to the general issue, if the matter of the statute affords a good avoidance. [He then contended,

(*a*) Before *Wilde*, C. J., *Maule*, J., and *Williams*, J.

that the statute afforded a defence to the action, and cited *Walstab* v. *Spottiswoode* (*a*), *Ward* v. *Robins* (*b*), and *Morant* v. *Sign* (*c*).]

Pigott, in reply, cited *Solly* v. *Neish* (*d*).

Cur. adv. vult.

May 12*th*.

WILDE, C. J.—This case comes before the Court upon a special demurrer to the plea.

The declaration was for money had and received. The plea states, in substance, that, before the passing of the statute 9 & 10 Vict. c. 28, intituled, "An Act to facilitate the dissolution of certain Railway Companies," a certain prospectus had been issued for the promotion of a certain intended partnership, for carrying into effect an undertaking for constructing a railway, to be called "The Direct Western Railway," which could not be constructed without the authority of Parliament; and that no act of Parliament had been obtained for that purpose. That, by the said prospectus, the defendant and several other named persons were declared to be a provisional committee; and it was also thereby declared, that the capital should consist of a certain amount therein mentioned, to be divided in the number of shares therein also mentioned; and that the allottees of such shares should pay 2*l*. 12*s*. 6*d*. upon each share allotted. That the defendant and other members of the provisional committee had the management of the undertaking; and that afterwards, at the request of the plaintiff, twenty shares were allotted to him; and that the defendant and the rest of the committee received from him 2*l*. 12*s*. 6*d*. upon each share. It further states, that the plaintiff and the defendant, and divers other persons, entered into an agreement of partnership for carrying the said undertaking into effect; and that the 2*l*. 12*s*. 6*d*. a share

(*a*) Ante, Vol. 4, p. 321; *S.C.*, 15 M. & W. 501.
(*b*) 15 M. & W. 237.
(*c*) 2 M. & W. 95; *S. C.*, 5 Dowl. 319.
(*d*) 2 C. M. & R. 355; *S.C.*, 4 Dowl. 248.

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upon the twenty shares allotted to the plaintiff, making 52*l.* 10*s.* so paid by the plaintiff, is sought to be recovered in this action, by reason of the undertaking not being prosecuted for a time, which the plaintiff alleges to be unreasonable.

The plea then proceeds to set forth, that meetings of the shareholders were called and held, according to the provisions of the statute before mentioned; at which meetings, in the manner prescribed by and according to the directions of the statute, the Company or partnership was dissolved, and the prosecution of the undertaking abandoned and discontinued; and thereupon, by force of the said statute, the affairs of the Company became liable to be wound up, according to the rules applicable to partnerships dissolved by mutual consent of all the parties; and that the sum of 52*l.* 10*s.* was subject to the resolution for dissolving the Company; and that the plaintiff's claim in the action is a part of the affairs of the Company to be wound up as aforesaid; and that, at the commencement of the suit, the affairs of the Company had not been wound up, nor had a reasonable time elapsed for winding up the same. The plea concludes with a verification.

To this plea the plaintiff has specially demurred, assigning several causes of demurrer, and among them, that the plea amounts to the general issue.

The Court is of opinion, that the plea is bad on that ground, and it therefore becomes unnecessary to advert to the other causes of demurrer. The general issue of non-assumpsit, in an action for money had and received, operates as a denial both of the receipt of the money and of the existence of those facts which makes such receipt by the defendant a receipt to the use of the plaintiff. Upon reference to the plea, it will be seen that the facts therein stated are set forth, to shew that the money sought to be recovered never was received by the defendant to the use of the plaintiff, and is therefore an argumentative traverse of the implied promise stated in the declaration, which is

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in effect the general issue; and all those facts might be given in evidence under non-assumpsit.

The case is similar in principle to that of *Solly* v. *Neish*, where, in an action for money had and received, the plea set forth the circumstances under which the money sought to be recovered was received by the defendant, and from those circumstances claimed a right of set-off: the plea was held to be bad, as amounting to the general issue. The case also of *Clark* v. *Dignam* (*a*) is in point. In that case the general issue had been pleaded to an action for money had and received, and it appeared that the money sought to be recovered had been received by the defendant, as attorney in an action brought in the plaintiff's name against one Duncombe; and the defendant proved that the plaintiff had allowed his name to be used in such action at the request of Edwards, who really employed the defendant, and who was indebted to the defendant in an amount exceeding that claimed by the plaintiff, and which the defendant therefore claimed as a set-off. It was objected, on the part of the plaintiff, that, as the defendant had acted as attorney on the record for the plaintiff, the defendant ought to discharge himself by proving payment to Edwards; but *Parke*, B., said, "No, it all arises on the general issue; the defendant disputes all the facts, from which the legal inference arises, that the money was money had and received to the use of the plaintiff;" which was assented to by the Court.

In the present case, the whole object and effect of the plea is to shew that the promise stated in the declaration will not be implied in law, from the facts and circumstances set forth in the plea. Therefore, there must be

Judgment for the plaintiff.

(*a*) 3 M. & W. 478.

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BAIL COURT.

Hilary Term, 1849.

Jan. 20th.

Ex parte BADDELEY.

The directions in the 39th section of the 8 & 9 Vict. c. 18, requiring inquisitions to be held before coroners, where sheriffs are interested, were introduced for the protection of the party against whom the interest would operate, and may be waived by him. Therefore, where a Railway Company issued their warrant to a sheriff to summon a jury to assess compensation under the 8 & 9 Vict. c. 18, and the under-sheriff, before whom the inquisition was to be held, previous to the inquiry, informed the landowner that he was a shareholder in the Company, and the landowner made no objection until the verdict had been given :— *Held*, that he had elected to waive the protection of the statute.

THIS was a motion for a certiorari to bring up an inquisition and proceedings taken before the under-sheriff of the county of Stafford into this Court, for the purpose of being quashed.

Allen, Serjt., moved upon affidavits, from which it appeared that Mr. Baddeley, being an owner of certain lands in the parish of Stockton-upon-Trent, in the county of Stafford, (through which the North Staffordshire Railway Company proposed to carry their railway), was served on behalf of that Company with a notice, dated the 14th of October, 1847, stating, that, in pursuance of their acts, and of the Lands Clauses Consolidation Act, they intended to issue their warrant to the sheriff of the county of Stafford, under their common seal, requiring him to summon a jury to assess the value of the said lands and the amount due for compensation. The warrant accordingly issued, and an inquisition was taken before the under-sheriff on the 20th of December, 1847, when a sum of 300*l.* was awarded by way of purchase-money for the land, and 200*l.* by way of compensation for the damage arising from severance. It appeared, from the affidavit of Mr. Baddeley's solicitor, that, "on the occasion of his attending at the office of Mr. Hand, the under-sheriff of the county of Stafford, to reduce the list of the special jury for the said inquisition, in a conversation he then had with the said Mr. Hand, that gentleman stated, that he was then a shareholder in the said North Stafford-

shire Railway Company; that it was not till after the holding of the said inquisition that this deponent was aware that the circumstance of the said Robert William Hand being a shareholder in the said Company deprived him of his jurisdiction, as such under-sheriff, in presiding at the said inquisition." Mr. Baddeley in his affidavit swore, that he was not aware of the under-sheriff's interest till after the inquisition had taken place.

It was contended, that these facts, operating on the 8 & 9 Vict. c. 18, s. 39 (*a*), disqualified the under-sheriff from holding the inquisition; and that, he having no authority in the matter, the proceedings were coram non judice.

Cur. adv. vult.

ERLE, J.—A motion was made for a certiorari to remove an inquisition taken before the under-sheriff of the county of Stafford, on the ground that he was interested; and that, therefore, the warrant for summoning the party ought to have been sent to the coroner, under the 8 & 9 Vict. c. 18, s. 39.

(*a*) Which enacts, "In every case in which any such question of disputed compensation shall be required to be determined by the verdict of a jury, the promoters of the undertaking shall issue their warrant to the sheriff, requiring him to summon a jury for that purpose, and such warrant shall be under the common seal of the promoters of the undertaking, if they be a corporation, or if they be not a corporation, under the hands and seals of such promoters, or any two of them; and if such sheriff be interested in the matter in dispute, such application shall be made to some coroner of the county, in which the lands in question, or some part thereof, shall be situate; and if all the coroners of such county be so interested, such application may be made to some person having filled the office of sheriff or coroner in such county, and who shall be then living there, and who shall not be interested in the matter in dispute; and with respect to the persons last mentioned, preference shall be given to one who shall have most recently served either of the said offices; and every ex-sheriff, coroner, or ex-coroner shall have power, if he think fit, to appoint a deputy or assessor."

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It appeared that the warrant was directed to the sheriff, who had no interest. The under-sheriff had an interest, and acted on the warrant, but gave notice of his interest to Mr. Baddeley's attorney before any step was taken; and no objection was made on the ground of his interest until the verdict had been given.

I am of opinion, that the direction in respect of the interest of the sheriff was introduced for the protection of the party against whom the interest would operate; that he may waive the protection, if he so elects; and that Mr. Baddeley, under the circumstances, did elect to waive the protection in this case.

Rule refused.

COURT OF EXCHEQUER.

Easter Term, 1848.

1848.
April 19th.

WILLIAMS *v.* PIGOTT.

In an action against a provisional committee-man on a contract entered into by the committee of management appointed by the provisional committee, it is a question for the jury, whether the defendant appointed the managing committee his agents, to pledge his credit.

Where nothing else appears than that there is a managing committee appointed by the provisional committee, the jury ought not to conclude that the former is agent for the latter to pledge their credit.

ASSUMPSIT for work and labour, money lent, money paid, and on an account stated.

Pleas: first, non-assumpsit; secondly, payment.

The cause was tried at the last summer assizes for the county of Gloucester, before *Patteson*, J., when it appeared that the action was brought to recover the amount of an atttorney's bill for business done by the plaintiff, as the attorney of "The Wolverhampton, Bridgnorth, and Ludlow Railway Company." The defendant had been a member of the provisional committee; and at a meeting of

that committee, held on the 8th of November, 1845, the plaintiff and the defendant being present, the prospectus of the Company was settled and adopted, and ordered to be circulated; in which the plaintiff's name appeared as the solicitor of the Company, and the defendant's as one of the provisional committee. Amongst other provisions contained in that prospectus was the following:—"Until an act of Parliament shall be obtained, the affairs of the Company shall be under the direction and control of the committee of management, who are hereby empowered to enter into such arrangements, as shall best serve the interests of this Company and the public, with existing or projected companies, and also to nominate the first directors of the Company." At that meeting, the committee of management was appointed. It further appeared, that, after the defendant had left the meeting, he was appointed one of the committee of management in the place of one of the others previously appointed, and in the advertisements inserted in one of the newspapers, which the plaintiff was in the habit of taking in, his name appeared as one of the managing committee; that the circulars issued to the members of the committee of management, were regularly forwarded to the defendant, and kept by him; and though he had never attended any of the meetings of that committee, he had on one occasion promised to do so. It also appeared, that an application had been made to the defendant, as a provisional committeeman, in January, 1846, to take up the shares allotted to him; to which he returned an answer, "that, after the best consideration which he had been able to give the subject, he thought it desirable to decline the shares which it was proposed to allot to him, as one of the members of the provisional committee. It did not appear, that there was any ground for imputing fraud to any of the parties, but that the scheme was a bonâ fide one, and had proved abortive for want of funds.

The learned judge directed the jury to consider whether

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they were satisfied that the defendant was one of the members of the managing committee; that, if they were not so satisfied, then that the fact of the defendant being a member of the provisional committee did not make him personally liable, nor the fact of his assisting in the appointment of the committee of management; but that they must be satisfied, under all the circumstances, that the defendant, as one of the provisional committee, appointed the committee of management his agents, for the purpose of pledging his credit. The jury found a verdict for the defendant.

Whateley now moved (*a*) for a new trial, on the ground of misdirection. The learned judge ought to have directed the jury, that, by the appointment of the committee of management, the provisional committee had appointed them their agents, and had thereby authorised them to pledge their credit for the necessary expenses attending the formation of the Company. *Wood* v. *Harding* (*b*); *Reynell* v. *Lewis* (*c*); *Wyld* v. *Hopkins* (*d*); *Barnett* v. *Lambert* (*e*); *Pitchford* v. *Davis* (*f*). [*Parke*, B. — In *Wood* v. *Harding*, the question left to the jury was, whether, under all the circumstances, the defendant had given the committee authority to act for him, and to pledge his credit. Consistently with the prospectus in this case, the managing committee might have had the whole management of the affairs of the Company in their own hands on their own responsibility, and the provisional committee might have had nothing whatever to do with it, beyond the mere fact of allowing their name to be used: so that, in truth, the question is, what was intended by appointing a managing committee? "Is the meaning, that the acting committee is to take the whole

(*a*) Before *Pollock*, C. B., *Parke*, B., *Rolfe*, B., and *Platt*, B.
(*b*) 8 Law Times, 237.
(*c*) Ante, Vol. 4, p. 351; *S. C.*, 15 M. & W. 530.
(*d*) Id.
(*e*) Id. 308, 489.
(*f*) 5 M. & W. 2.

management, to the exclusion of the provisional committee, their provisional character having ceased? in which case the provisional committee would not be liable; or does it mean that the provisional committee-men have appointed the acting committee, or the majority of it, on their behalf and as their agents? in which case they would be liable for the contracts of the acting committee, or the majority made as such agents" (*a*). This is a question of fact, to be determined by the jury in each particular case.] He cited *Barnett* v. *Lambert* (*b*), *Pitchford* v. *Davis* (*c*).

POLLOCK, C.B.—I am of opinion that no rule ought to be granted in this case. It is impossible for this Court to lay it down as matter of law, that, if the provisional committee of a Railway Company appoint a committee of management, they make them their agents to pledge their credit. It is in every case a question for the jury. My opinion is formed without reference to the case of *Wood* v. *Harding*. We have no report of that case (*d*), and we cannot, therefore, express any opinion as to the law there laid down; but probably, under the circumstances, the direction in that case was correct.

PARKE, B.—I am of the same opinion. It was a question of fact for the jury to determine, whether the defendant had made the managing committee his agents to pledge his credit, as my Brother *Patteson* correctly left to them to say. First, did the defendant accept the appointment of managing committee-man? If he did, he would be responsible for what he did as such. Then the case being put on the ground, that, as member of the provisional committee, he had appointed the managing committee to

(*a*) *Wyld* v. *Hopkins*, ante, Vol. 4, p. 351; *S. C.*, 15 M. & W. 530.
(*b*) Id. 308, 489.
(*c*) 5 M. & W. 2.
(*d*) The case was read by *Whateley*, from an abstracted collection of cases.

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carry on the undertaking, with power to contract for him, my Brother *Patteson* has rightly put that to the jury. I cannot, however, help remarking, that, where nothing more appears than that there is a managing committee appointed by a provisional committee, it would be very wrong to draw the conclusion, that the one is agent for the other. The provisional committee never dream, that, by appointing the managing committee, they make the latter their agents to bind them.

The difficulty in these cases arises from forgetting that you cannot make a party liable upon a contract which he has never entered into. The prospectus was immaterial, because the plaintiff knew the nature of the transaction. It is as to third parties, who are unacquainted with the nature of the Company, that the prospectus becomes of importance. I think, therefore, that there ought to be no rule.

ROLFE, B., and PLATT, B. concurred.

Rule refused.

COURT OF EXCHEQUER.

Hilary Term, 1848.

Jan. 11*th*.

BELFAST AND COUNTY DOWN RAILWAY COMPANY *v.* STRANGE.

The allegation in the general form for declaring, given by the 8 & 9 Vict. c. 16, s. 26, "that the defendant *is*" the holder of shares, means that he was so at the time the call was made.

THIS was a rule obtained by *Ogle*, calling upon the defendant to shew cause why so much of an order of *Platt*, B., and rule of court thereon, as allowed the defendant to plead the second plea herein, should not be rescinded.

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The declaration was on debt against a shareholder for calls. It stated, that, whereas the defendant, before and at the time of the commencement of this suit, to wit, on the 10th day of June, 1847, was and still is the holder of divers, to wit, ten shares in the said Company, and at the time of the commencement of this suit was and still is indebted to the said Company in a large sum of money, to wit, 150*l.* in respect of two several calls, the first of the said calls being a call of a certain sum, to wit, 2*l.* 5*s.* upon each of the said shares, and the other of the said calls being a call of a certain other sum, to wit, 5*l.* upon each of the said shares theretofore respectively, to wit, on the 1st of October, 1846, and the 8th of April, 1847, respectively, duly made by the said Company, whereby an action hath accrued to the said Company, by virtue of a certain act of Parliament made and passed in a session of Parliament holden in the 8th and 9th years of the reign of her Majesty Queen Victoria, intituled &c. (8 & 9 Vict. c. 16), and also of an act of Parliament made and passed &c. (9 & 10 Vict. c. lxxxi), to demand and have of and from the defendant the said sum above demanded, &c. Breach, non-payment.

The defendant obtained an order of the learned Baron to plead the following pleas: — First, never indebted. Secondly, that, at the time of the commencement of this suit, the defendant was not the holder of the said shares in the said Company, or of any of them, modo et formâ. Thirdly, that the defendant was not the holder of the said shares in the said Company at the time when the calls were, or either of them was made, modo et formâ. Fourthly, that the said calls were not, nor was either of them, duly made, modo et formâ.

Atkinson shewed cause (*a*). — The question in this case depends on the construction of the 26th section of the 8 & 9 Vict. c 16 (*b*), (The Companies Clauses Consolidation Act).

(*a*) Before *Parke*, B., *Alderson*, B., and *Platt*, B.

(*b*) The 26th and 27th sections enact as follows: Sect. 26, "In

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The word "is" in that section means, at the time of the commencement of the suit; the allegation in the declaration, that he was at that time the holder of shares, is a material averment, and consequently traversable. [*Parke*, B.—The objection to the second plea appears to be, that it is immaterial whether the defendant was the holder of these shares at the commencement of the suit; the question is, was he so at the time the calls were made, or, at least, when they became due?] The objection probably is founded on the 16th section, which prohibits the transfer of shares after a call is made, unless all calls due have been paid up; but this does not prevent a transfer with the consent of the Company, though the calls may not have been paid, and in that case he may have been the holder at the time of the call, and not at the commencement of the suit, and still not liable.

Ogle, contrà.—The first plea puts in issue every material

any action or suit to be brought by the Company against any shareholder to recover any money due for any call, it shall not be necessary to set forth the special matter; but it shall be sufficient for the Company to declare that the defendant is the holder of one share, or more, in the Company (stating the number of shares), and is indebted to the Company in the sum of money to which the calls in arrear shall amount, in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the Company by virtue of this and the special act."

Sect. 27. "On the trial or hearing of such action or suit it shall be sufficient to prove that the defendant, at the time of making such call, was a holder of one share or more in the undertaking, and that such call was, in fact, made, and such notice thereof given as is directed by this or the special act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever; and thereupon the company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls, amounting to more than the sum prescribed for the total amount of calls in one year, had been made within that period."

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allegation of the declaration, and if the second plea raises a material issue, that is raised under the first plea; but, in truth, that issue is immaterial, as appears by the 27th section of the 8 & 9 Vict. c. 16. [*Parke*, B.—That section shews what the Legislature meant by the word "is," in the previous section. The declaration ought simply to have stated that the defendant is a shareholder, and indebted to the Company for calls; the allegation, that he was a shareholder at the time of the commencement of the suit, raises a doubt whether the plea of never indebted would answer the whole declaration. The Legislature says, that, under the allegation that the defendant *is* the holder of shares, it shall be sufficient to prove him a holder at the time that the call was made. *Alderson*, B.—Both the second and third pleas appear unnecessary, for either they mean the same thing, or one is useless. The difficulty is, that the evidence to be given at the trial would prove the third plea; yet that plea does not traverse any allegation in the declaration.] The time to look to is that when the call was made; and the plaintiff must, under the general issue, prove that the defendant was then a shareholder.

PARKE, B.—It is evident, on comparing the 26th and 27th sections, that the term "is" a holder of shares, in a declaration correctly framed under the statute, would mean that he was so at the time when the call was made. The objection to this declaration is, that it does not follow the parliamentary form, but interpolates the words at the time of the commencement of the suit. The rule ought, therefore, to be, to amend the declaration and second plea, by striking out the words "at the time of the commencement of the suit," and to strike out the third plea altogether; then the allegation in the declaration, that the defendant "is the holder of shares," would be traversed in the sense in which that expression is used in the 26th section of the statute

Rule accordingly.

COURT OF EXCHEQUER.

Hilary Term, 1848.

Jan. 25th.

RAMSDEN *v.* THE MANCHESTER SOUTH JUNCTION AND ALTRINGHAM RAILWAY COMPANY.

Trespass for breaking and entering the plaintiff's close, and making a tunnel through it.—Plea, that the close was a public highway, and that the defendants, by act of Parliament, were incorporated for the purpose of making a railway; that, before the passing of the act, plans and sections of the railway, and also books of reference, had been deposited with the clerks of the peace &c.; that by the said act it was enacted, that, subject to the provisions of that and the Companies Clauses Consolidation Act, and the Railways Clauses Consolidation Act, it should be lawful for the defendants to make and maintain the railway in the line and upon the lands described on the said plans, &c., and to enter upon, take, and use such of the said lands as should be required for that purpose; that the said close in which &c., was delineated and described on the said plans, &c., and is such public highway; whereupon the defendants, under and by virtue of the said acts, entered upon the said close, &c., under the surface thereof, in order to make, and did then so make under the said highway a tunnel, and in so doing committed the said trespasses.—Replication, that the close was required to be purchased and permanently used for making and permanently maintaining the railway; that the plaintiff, being the owner of the close for a term of years, subject to the said public highway, did not consent that the defendants might enter upon or take the close, nor did the defendants give any notice to the plaintiff to sell and convey the same to them, or that they required the same; nor did the defendants pay the plaintiff, or deposit in the Bank any purchase-money or compensation for the interest of the plaintiff therein. That the defendants did not enter on the close for the purpose of merely surveying or taking levels, &c.; but for the permanent using and taking the same; and at the said time when &c., and thence hitherto, have used and now permanently use the said close, for the permanent purpose of the railway:—*Held*, on demurrer to the replication, that it must be taken on these pleadings, that the tunnel had been made with a view to its permanently forming part of the railway; and as it appeared that the defendants had not, before entry, paid the compensation due to the plaintiff, the plea afforded no defence to the action.

TRESPASS for breaking and entering the plaintiff's close, and for digging and excavating therein a tunnel and hole 50 feet long and 50 wide, and carrying away the soil.

Plea: That the close in which &c., was a certain common and public highway and street for all the liege subjects of our lady the Queen to pass and repass on foot, and with cattle, carts, carriages, through, over, and along the same at all times of the year, at their free will and pleasure; and that the said Company, before the committing of the supposed trespasses, &c., by a certain act of Parliament made &c., intituled &c., (8 & 9 Vict. c. cxi), the defendants were in-

corporated by the name &c., and were authorised to purchase, hold, and sell lands, within the restrictions in the said act contained, for the purposes of the said undertaking. And whereas, before the making and passing of the said act of Parliament, certain plans and sections of the said railway, showing the line and levels thereof, and also books of reference, containing the names of the owners, lessees, and occupiers of the land through which the same was intended to pass, had been deposited with the respective clerks of the peace of the counties of Lancaster and Chester. And whereas, in and by the said act of Parliament it was further enacted, that, subject to the provisions in that said act, and to the Companies Clauses Consolidation Act, the Lands Clauses Consolidation Act, and the Railways Clauses Consolidation Act, it should be lawful for the said Company to make and maintain the said railway and works in the line and upon the lands delineated and described on the said plans and in the said books of reference, and to enter upon, take, and use such of the said lands as should be required for that purpose. And whereas the said close in which &c., was in the line delineated and described on the said plans and in the said books of reference, and was and is such public street and highway as aforesaid, and was and is within the said lands described in the said plans, and mentioned in the said books of reference, and is there described as such public street and highway as aforesaid; whereupon the said Company afterwards, to wit, on the days and times in the declaration mentioned, under and by virtue of the said first-mentioned act of Parliament, and the said other acts incorporated therewith, and in pursuance of the powers and provisions therein contained for the purpose of constructing the said railway, entered into and under the said close in which &c., then being such public street or highway as aforesaid, under the surface thereof, in order to make, and did then so make,

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under the said public street and highway, a certain tunnel (such tunnel being thought proper by the said Company), the said Company doing as little damage as could be in the premises; and in so doing, the Company a little dug, excavated, &c., the said close of the plaintiff, and then made the said tunnel, &c., [confessing the trespasses in the declaration].—Verification.

Replication, that the said close of the plaintiff so dug, excavated, &c., at the time when &c., were, and still are, required to be purchased and permanently used for the purposes and under the powers of the several acts of Parliament in the said plea mentioned and specified, and other the acts of Parliament in that case made and provided, to wit, for making and permanently maintaining the said railway in the said plea mentioned. That the plaintiff, being the owner and occupier for the residue of a certain unexpired term, to wit, of 999 years, of the said close, earth and soil thereof, subject to the use of the same as a common and public highway, over the surface thereof, as in the said plea mentioned, did not at any time before, or at, or since the said time when &c., consent that the defendants should or might enter upon, or take the said close of him, the plaintiff, so dug, excavated, and bored, &c., as aforesaid, or the said earth and soil of the plaintiff; nor did the defendants, being the promoters of the said undertaking, give any notice to the plaintiff so interested in the land of the said close, and the earth and soil thereof, to sell and convey, or release the same or any part thereof to them, or that they required the same or any part thereof; nor did the defendants pay to the plaintiff, then having such interest as aforesaid in the said close and the earth and soil thereof, or deposit in the Bank in the manner in the said acts of Parliament mentioned, any purchase-money or compensation for the said interest of the plaintiff therein, or any part thereof; that the defendants did not enter into the said close of the plaintiff as

aforesaid, or take and use the same and convert the earth and soil thereof to their own use, as in the said plea mentioned, for the purpose merely of surveying or taking levels of the said lands or railway, or of probing or boring to ascertain the nature of the soil, or of setting out the line of the works for the said railway, but for the permanently using and taking the same to their own use, and at the said time when &c., and thence hitherto, have used and now permanently use the said close of the plaintiff and the earth and soil thereof of him the plaintiff, for the permanent purpose of the said railway, under and by virtue of the said several acts of Parliament and the powers and provisions therein contained. Verification, general demurrer and joinder.

Cowling (with whom was *Baines*) in support of the demurrer (*a*).—The defendants were not trespassers, but were justified in what they did by the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18 (*b*), and the Railways Clauses

(*a*) Before *Pollock*, C.B., *Parke*, B., *Alderson*, B., and *Rolfe*, B.

(*b*) The following sections of the 8 & 9 Vict. c. 18, and the 8 & 9 Vict. c. 20, were relied on at the argument:—

8 & 9 Vict. c. 18, s. 18, enacts, "That when the promoters of the undertaking shall require to purchase or take any of the lands which by this or the special act, or any act incorporated therewith, they are authorised to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this act to sell and convey or release the same, or such of the said parties as shall, after diligent inquiry, be known to the promoters of the undertaking, and by such notice shall demand from such parties the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works."

Sect. 84.—"And with respect to the entry upon lands by the promoters of the undertaking, it is enacted as follows:—The promoters of the undertaking shall not, *except by the consent of the owners and occupiers*, enter upon any lands which shall be required

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Consolidation Act (8 & 9 Vict. c. 20), as the lands were not *permanently used* by the Company within the meaning

to be *purchased or permanently used* for the purposes and under the powers of this or the special act, *until they shall either have paid to every party* having any interest in such lands, or deposited in the bank, in the manner herein mentioned, the purchase-money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein: Provided always, that, for the purpose merely of surveying and taking levels of such lands, and of probing or boring to ascertain the nature of the soil, and of setting out the line of the works, it shall be lawful for the promoters of the undertaking, after giving not less than three nor more than fourteen days' notice to the owners or occupiers thereof, to enter upon such lands without previous consent, making compensation for any damage thereby occasioned to the owners or occupiers thereof."

8 & 9 Vict. c. 20, s. 6.—"And with respect to the construction of the railway, and the works connected therewith, it is enacted as follows:—In exercising the power given to the company by the special act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this act, and in the said Lands Clauses Consolidation Act; and the company shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise, as regards such lands, of the powers by this or the special act, or any act incorporated therewith vested in the company, and except where otherwise provided by this or the special act, the amount of such compensation shall be ascertained and determined in the manner provided by the said Lands Clauses Consolidation Act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof; and all the provisions of the said last-mentioned act shall be applicable to determining the amount of any such compensation, and to enforcing the payment or other satisfaction thereof."

Sect. 16.—"Subject to the provisions and restrictions in this and the special act, and any act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works; (that is to say): they may make or construct, in, upon, across, under or over any lands or any streets hills, valleys, roads, railroads or tramroads, rivers, canals, brooks, streams, or other waters, within the lands described in the said

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of the 84th section of the first-mentioned act on which the replication is founded. Perhaps the first-mentioned act does not apply to underground works; but the last does, by sect. 16, making compensation, and this they were not bound to do before entering upon the land: *Lister* v. *Lobley* (*a*); *Peters* v. *Clarson* (*b*). Indeed, before the works are completed, it is impossible to say what damage has been sustained. [*Pollock*, C. B.—That argument would equally apply to a case where the surface is taken.] No: because it would be impossible to say what would be the effect of underground works; and, besides, it would be difficult to ascertain the nature of the subsoil.

Hoggins, contrà.—The Company are empowered by the 8 & 9 Vict. c. cxi, sect. 6, to execute the works mentioned in the 16th section, subject to the provisions of the Lands Clauses Consolidation Act, one of which (sect. 84) is, that they shall make compensation, or deposition the Bank before entering; and no distinction is made between underground or surface works, so that the making compensation or deposit were conditions precedent to the right to enter; and the Company were not justified, until they had made such deposit or compensation. [*Parke*, B.—The 46th section of the 8 & 9 Vict. c. 20, makes certain provisions with respect to the crossing of roads by the railway: and, has the owner of the soil in such case a right to insist upon the Company purchasing his interest in it before they carry their works across it?] It is submitted that he has.

plans or mentioned in the said books of reference, or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings and fences, as they think proper, &c. . . . . Provided always, that in the exercise of the powers by this or the special act granted, the Company shall do as little damage as can be, and shall make full satisfaction, in manner herein and in the special act, and any act incorporated therewith, provided, to all parties interested for all damage by them sustained by reason of the exercise of such powers."

(*a*) 7 A. & E. 124.

(*b*) 8 Scott N. R. 384.

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Cowling, in reply, referred to the 53rd, 54th and 55th sections of the Railways Clauses Consolidation Act.

Cur. adv. vult.

POLLOCK, C. B.—This was an action of trespass, in which the plaintiff complained that the defendants had broken and entered his close, and cut a tunnel through it. The defendants justified under a local act of Parliament (8 & 9 Vict. c. cxi), whereby they were incorporated and were authorised to make a railway, subject to the provisions of the Lands Clauses Consolidation Act, and the Railways Clauses Consolidation Act; and by their plea they aver, that the close in question was a public highway, and was marked and delineated in the plan and book of reference as part of the lands through which the intended railway was to pass; and, therefore, they say, that, for the purpose of making their railway, they entered into and under the said close, and made the tunnel, doing no unnecessary damage.

The plaintiff replied, that the close in question was and is required to be purchased and permanently used for the purpose of the railway; and that he, the plaintiff, being entitled to the soil of the said close for a term of 999 years, subject to the public right of way over the same, the defendants entered and made the tunnel, without any consent of the plaintiff, and without giving him any notice to sell and convey the same, and took the same for the purpose of permanently using it for the railway. To this replication the defendants demur, and the question is, whether, on the pleadings, there is a sufficient justification for the act of the defendants in cutting this tunnel through the plaintiff's close; and this depends entirely on the Lands Clauses Consolidation Act, and the Railways Clauses Consolidation Act.

The first act, 8 & 9 Vict. c. 18, is a general act, pointing out the course to be taken by all companies incorpo-

rated under special acts of Parliament for purposes which require that they should acquire and take lands; and, without going into any detail, it is sufficient to say, that the plea certainly does not aver that the defendants have complied with the requisitions of this act. It must be taken on the pleadings, that the tunnel has been made with a view of its permanently forming part of the railway; and if, therefore, this could not be done without first purchasing the soil taken, or at least paying a compensation for the permanent occupation of it, then it is clear, that the defendants were not justified in committing the trespasses complained of. But on the part of the defendants it was argued, that they are not bound to justify, under the Lands Clauses Consolidation Act; for what they have done is warranted by virtue of the 16th section of the subsequent act—the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20). The defendants contend, that, under this section they are in terms authorised to make (inter alia) any tunnels for the purpose of their railway which they may think expedient. The defendants do not dispute their ultimate liability to make compensation for any damages they may occasion by making the tunnel; but they contend, that the quantum of damage cannot be ascertained until the tunnel is made; and that, in the meantime, they are not trespassers for making it.

We cannot, however, take this view of the case. If the Company made a permanent tunnel for the railway to pass through, by virtue of the powers given by the 16th section, they must do so by the express enactment in the 6th section, subject to the provisions and restrictions in the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), and one of those restrictions is, that whether they purchase the land itself, or permanently occupy it, they must pay the compensation before entry; so that, whether the defendants acted under the first or second act, the defence is insufficient on the same ground that they have not,

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before entry, paid the compensation due to the owner of the land through which the tunnel passes. We think, therefore, there must be

Judgment for the plaintiff.

COURT OF EXCHEQUER

Michaelmas Term, 1848.

Dec. 1*st.*

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Case by a reversioner. The declaration stated, that, at the time of the committing the grievances, a certain messuage was in the possession of H., as tenant thereof of the plaintiff, the reversion thereof then and still belonging to the plaintiff; and then complained of the defendant's pulling it down. The defendant traversed, that the messuage was in the possession or occupation of H., as tenant thereof to the plaintiff, nor did the reversion thereof belong to the plaintiff. The plaintiff, it appeared, was a lessee of an unexpired term in the premises, and had demised the same to H., as yearly tenant. H. had quitted the premises a short time before the committing of the alleged grievances, which were taken possession of by a third party. She had not, however, assigned her interest:—*Held*, that the meaning of the averment in the declaration was, that, at the time when the grievances were committed, there was in H. a right to the possession in point of interest, so that the plaintiff could sue as reversioner, and that the plea was proved. *Held*, secondly, that, in such case, the proper measure of damages was, by how much less the reversion would sell, in consequence of the injurious act of the defendant.

CASE.—The declaration stated, that certain messuages in the county of Surrey were in the possession of J. C. Haywood, as tenant to the plaintiff; yet the defendant, intending to injure the plaintiff in her reversionary estate,

The defendant pleaded, fourthly, a justification, as servant of the London and South Western Railway Company, under the Lands Clauses Consolidation Act, 1845, and alleged that a bond had been given to the plaintiff, under the 85th section of that act. That section requires, that, if the promoters of an undertaking should be desirous of entering any land before an agreement should have been come to with the party interested, a bond should be given to such party, conditioned for payment *to such party, or for deposit in the Bank for the benefit of the parties interested in such land, as the case may require*, under the provisions herein contained, all such purchase-money, &c. The bond given in evidence was conditioned to pay the plaintiff, "*her heirs, executors, administrators or assigns*, or to deposit in the Bank, *or otherwise, for the benefit of the parties interested*," &c., as the case may require, under the provisions contained in the Lands Clauses Consolidation Act:—*Held*, that the introduction of the words, "*or otherwise*," were not authorised by the act, and that the bond was not, therefore, in compliance with it. *Semble*, that if the only objection had been, that, instead of being conditioned for payment to the plaintiff, it had been conditioned for payment to her, "her heirs, executors, administrators, or assigns," it might have been sufficient.

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pulled down and destroyed the same, and dug up the foundations, and carried away the materials, and converted the same to the defendant's use.

Pleas,—first, not guilty.

Secondly, a traverse that the messuages were in the possession of the said person in the declaration mentioned, as tenant to the plaintiff, and that the reversion belonged to the plaintiff.

Thirdly, leave and license of the plaintiff.

Fourthly, that long before the said time when &c., or any of them, to wit, on the 11th January, 1845, the London and South Western Railway Company, by virtue of a certain act of Parliament, to wit, &c., was empowered, amongst other things, to make an extension, to wit, from the Nine Elms terminus of the said railway to a certain point near to Waterloo and Hungerford Bridges, according to the provisions of the 8 & 9 Vict. c. 19, of the 8 & 9 Vict. c. 20, and of the first-mentioned act; and by the said first-mentioned act it was further enacted, that it should be lawful for the said Company to make and maintain the said extension, amongst others, upon and over the said messuages, in which &c., and which said messuages were delineated on the plans and described in the books of reference in the said act mentioned, and in the schedule to the said act therein also mentioned, and to enter upon, take, and use such of the said messuages as should be necessary for the said purpose; provided that the powers of the said Company, given by the said acts, for the compulsory purchase of messuages for the purposes of the said first-mentioned act, should not be exercised after the expiration of three years. That the said messuages, in which &c., were, at the time of giving the notice hereinafter mentioned, necessary for the purpose of making the said railway, and were required by the said Company for that purpose; and that the said messuage, in which &c., being so necessary, the said Company, within three years, and before the said

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times when &c., to wit, on the 19th November, 1846, gave notice to the plaintiff that they, the said Company, required to purchase and take the said messuage, in which &c., for the purposes and under the provisions of the said acts, and by their said notice did then demand the particulars of the estate and interest of the plaintiff in the said messuage in which &c., and of the claims made by the plaintiff in respect thereof; and the said notice, so given as aforesaid, did then state the particulars of the said messuage so required, and that the said Company were willing to treat for the purchase of all and any the estate and interest of the plaintiff therein, and as to the compensation to be made for the damage that might be sustained by her by reason of the making of the said railway, and of the execution of the said works thereof. That afterwards, and before the said times when &c., to wit, on the 1st February, 1847, the whole of the capital or estimated sum for defraying the expenses of the said undertaking was subscribed under contract binding the parties thereto, their heirs, executors, and administrators, for the payment of the several sums by them respectively subscribed, as in and by the said Lands Clauses Consolidation Act, 1845, is required; and the said Company were desirous of entering upon and using the said messuage, in which &c., before any agreement had been come to, or award made or verdict given, for the purchase-money or compensation to be paid by them, the said Company, in respect of the said messuage and premises, with the appurtenances in which &c., of all which the plaintiff had notice; and the plaintiff did not consent to, but dissented from, the said Company so entering on the said messuage in which &c., and thereupon afterwards, and before any agreement had been come to, or award made, or verdict given for the purchase-money or compensation to be paid by the said Company in respect of the said messuage, in which &c., and before the said times when &c., to wit, on &c., an application was then

made by the said Company to Joshua Lockwood and George Scovell, Esquires, then being justices of the peace within the county of Surrey aforesaid, assembled and acting together in and for the said county of Surrey, within which county the said messuages were situate; and not then being interested in the matter of the said application, they the said justices, then, by writing under their hands, duly nominated and appointed one George Allen, of &c., then being an able practical surveyor, for determining the value of the interest in the said messuage &c. which the plaintiff was entitled to; and thereupon afterwards, on &c., the said George Allen having, after such nomination, and before entering upon the duty of making such valuation as aforesaid, in the presence of the said George Scovell, one of the said justices, duly made and subscribed the declaration in that behalf required by the Lands Clauses Consolidation Act, 1845, determined the value of the interest in the said messuage in which &c., to be the sum of 126*l.*, and then annexed to his said valuation a declaration in writing, subscribed by him, of the correctness thereof; and thereupon the said Company deposited in the Bank of England, by way of security, as hereinafter mentioned, the sum of 126*l.*, in the name and with the privity of the Accountant-General, to the credit of the plaintiff; and the said Company also, on the 4th March, 1847, they, the said Company, and the plaintiff not having then differed as to the sufficiency of the sureties, parties to the bond hereinafter mentioned, gave to the plaintiff a bond under the common seal of the Company, and under the hands and seals of two sufficient sureties, to wit &c., in pursuance of the said Lands Clauses Consolidation Act, 1845, whereby the said Company and the said sureties became bound to the plaintiff in the penal sum of 126*l.*, conditioned for payment to the plaintiff, or for deposit in the Bank of England, for the benefit of parties interested in the said messuage, in which, &c., as the

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case might require, under the provisions of the said last-mentioned act, of all such purchase-money and compensation as might, in manner as in the same act provided, be determined to be payable by the said Company in respect of the interest of the plaintiff in the said messuage, in which &c., together with interest thereon, at the rate of 5*l.* per cent.; and thereupon afterwards, and before any agreement had been come to, or award made, or verdict given for the purchase-money, or compensation to be paid by the said Company in respect of the said messuage, in which, &c., and within three years from the passing of the said first-mentioned act, to wit, on the said days and times in the declaration mentioned, the defendant, as the servant of the said Company, entered upon the said messuage, in which &c., for the purpose of making certain works, then being part of the said railway, and works hereinbefore in this plea mentioned, in the line in and by the said first-mentioned act authorised, and thereby committed the said supposed grievances. Verification.

The plaintiff took issue on the first two pleas; to the third, he replied de injuriâ; and to the last, "that the said Company did not at any time, before the said times when &c., deliver to the plaintiff a bond, under the common seal of the said Company, and under the hands and seals of two sufficient sureties, conditioned for payment to the said plaintiff, or for depositing in the Bank of England, for the benefit of the parties interested in the said messuage, in which &c., as the case might require, under the provisions of the said Lands Clauses Consolidation Act, 1845, of all such purchase-money and compensation as might, in manner in the same act provided, be determined to be payable by the said Company in respect of the interest of the plaintiff in the said messuage and premises in which &c., and according to the provisions of the said act in that behalf, modo et formâ &c.

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The cause was tried at the Surrey Assizes, 1848, before Lord *Denman*, C. J., when it appeared that the plaintiff, the lessee of an unexpired term in the premises in question, had demised them to Jane C. Heywood, as a yearly tenant, which tenancy had not expired at the time of the committing the alleged trespasses. She, however, did not occupy the premises at that time, having left them a short time previously, her claims against the Company being satisfied, but she had not assigned her interest. The land being required by the Company for the purposes of their railway, and they, being unable to agree with the plaintiff as to the amount of compensation, though they had satisfied all the other parties interested in the premises, proceeded to put in force the compulsory provisions of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), and in March, 1847, entered upon the premises in question, pulled down the house, and sold the materials to different parties, a portion of which was purchased by the defendant, a buyer of old materials, and removed by him. It was for this act that the defendant was sued. The action was brought after March, 1847. At the trial it was contended, that, inasmuch as the grievances complained of were committed after Heywood had parted with her interest in the premises, the defendant was entitled to a verdict on the second issue, as Heywood was not tenant to the plaintiff at that time. The learned Judge, however, considered that the plaintiff's right to the reversion was the substantial question in issue on that plea, and so directed the jury.

In support of the issue on the fourth plea, a bond in the common form was given in evidence. It was for the payment of 126*l.* to the plaintiff, or her attorney, executors, administrators, or assigns. The condition recited, that the Company required to purchase, for the purpose of the railway, the dwelling-house of the plaintiff; that notice had been delivered to her; that no agreement had been come to, or an award made, or verdict given, for the pur-

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chase-money or compensation to be paid to the plaintiff, in respect of her interest in the said dwelling-house; that the Company were desirous, and proposed, to enter upon and use the said dwelling-house, before any such agreement, award, or verdict as aforesaid should be come to, made, or given by the plaintiff, who did not consent to such entry; that the Company had paid into the Bank of England, in respect of the said dwelling, the said sum of 126*l.*; and concluded—"Now, the condition of the above-written bond or obligation is such, that, if the above-bounden London and South-Western Railway Company, John Hibbert, the younger, and Matthew Uxielli, some or one of them, their or some or one of their successors, heirs, executors, or administrators, shall pay to the said Eliza Hoskins, *her heirs, executors, administrators or assigns, or shall deposit in the Bank of England, or otherwise, for the benefit of the parties interested in the said dwelling-house,* shop and premises, as the case may require, under the provisions contained in the Lands Clauses Consolidation Act, 1845, all such purchase-money and compensation as may, in the manner in the same act provided, be determined to be payable by the said Company in respect of the interest of the said Eliza Hoskins in the said dwelling-house, shop, and premises, so about to be entered upon as aforesaid, together with interest thereon, at the rate of 5*l.* per cent. &c., then the above-written bond or obligation shall be void; but, otherwise, the same shall remain in full force."

It was contended, on behalf of the plaintiff, that the bond was not in conformity with the 85th section of the Lands Clauses Consolidation Act, and that the issue had not been proved by the defendant. His Lordship was of that opinion, and so directed the jury, who found a verdict for the plaintiff for 170*l.*; leave being reserved to the defendant, to move to enter a verdict for him on that issue, if the Court should be of opinion that it was not in conformity with the 85th section of the statute.

Channell, Serjt., having obtained a rule accordingly,

Gurney and *Baddeley*, now shewed cause (*a*).—The direction of his Lordship on the fourth issue was right. The defendant was bound to shew that the Company had given a bond, in conformity with the 85th section of the Lands Clauses Consolidation Act (*b*): this he has not done. The

(*a*) Before *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Rolfe*, B.

(*b*) Which enacts, "that, if the promoters of the undertaking shall be desirous of entering upon and using any such lands before an agreement shall have been come to, or an award made, or verdict given, for the purchase-money or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking to deposit in the Bank, by way of security, as hereinafter mentioned, either the amount of purchase-money or compensation claimed by any party interested in, or entitled to sell and convey, such lands, and who shall not consent to such entry, or such a sum as shall, by a surveyor appointed by two justices, in the manner hereinbefore provided, in the case of parties who cannot be found, be determined to be the value of such lands, or of the interest therein, which such party is entitled to or enabled to sell and convey, and also to give to such party a bond, under the common seal of the promoters, if they be a corporation, or, if they be not a corporation, under the hands and seals of the said promoters, or any two of them, with two sufficient sureties, to be approved of by two justices, in case the parties differ, in a penal sum equal to the sum so to be deposited, conditioned for payment to such party, or for deposit in the Bank, for the benefit of the parties interested in such lands, as the case may require, under the provisions herein contained, of all such purchase-money or compensation as may, in manner hereinbefore provided, be determined to be payable by the promoters of the undertaking, in respect of the lands so entered upon, together with interest thereon, at the rate of 5*l.* per cent. per annum from the time of entering on such lands, until such purchase-money or compensation shall be paid to such party, or deposited in the Bank, for the benefit of the parties interested in such lands, under the provisions herein contained; and upon such deposit, by way of security, being made as aforesaid, and such bond being delivered or tendered to such non-consenting party as aforesaid, it shall be lawful for the promoters of the undertaking to enter upon and use such lands, without having first paid or deposited the purchase-money or compensation, in other cases required to be paid or

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bond given in evidence is not warranted by the statute; instead of being conditioned for "payment to the party, or deposit in the Bank of England, for the benefit of the parties interested in the lands," it is conditioned "for the deposit in the Bank of England, *or otherwise*, for the benefit of the parties interested:" so that the Company, upon the construction of this bond, might make the deposit in any private bank, of which their own directors were partners. The bond is also insufficient, because it is not for payment to the obligee simply, but "to her heirs, executors, administrators, or assigns;" so that the condition would be satisfied by a payment to either one, and in that way money, which ought to go to the heir, might go to the executor, and vice versâ: *Daubney* v. *The Manchester Railway Company* (*a*). And in these acts of Parliament, that construction is to be adopted which is most favourable to the public: *Barker* v. *The North Staffordshire Railway Company* (*b*); *Poynder* v. *The Great Northern Railway Company* (*c*); *The Stockton and Darlington Railway Company* v. *Barrett* (*d*). As to the second plea, that was not proved; Heywood's interest continued up to the time of the committing the grievances; she had done no act to divest herself of her term; so that the occupation of the Company was in law her occupation: *Bull* v. *Sibbs* (*e*). [*Parke*, B.—Certainly; the interest of the plaintiff did not cease by the giving up the premises to the Company.] Lastly, the jury have correctly estimated the damages; she is entitled to have the premises restored to their original state.

Channell and *Bovill*, in support of the rule.—The bond

deposited by them, before entering upon any lands to be taken by them, under the provisions of this or the special act."

(*a*) Legal Observer, Vol. 35, p. 237.

(*b*) Ante, p. 401; 12 Jurist, 324.

(*c*) Ante, p. 196; *S. C.* 2 Phil. 330.

(*d*) Ante, Vol. 2, p. 443, 446; in House of Lords, ante, Vol. 3, p. 724; 11 Cl. & F. 590.

(*e*) 8 T. R. 327.

substantially complies with the intention of the statute. The words "or otherwise" are followed by the words "as the case may require, under the provisions contained in the Lands Clauses Consolidation Act;" these latter words qualify the former, so that a payment to a party not entitled would not satisfy the condition of the bond, for it would not be such a payment as is required by the act. [*Parke*, B.—Suppose that the condition had been to perform the stipulations contained in, and required by, the act of Parliament, would that have been a sufficient bond? The Company, at any rate, ought not to give a bond raising a doubtful question.] As to the second issue, the plaintiff has undertaken to state her title, and an issue is taken upon it; she must prove it as stated: *Vowles* v. *Miller* (*a*); and it is clear that the possession was not in Heywood at the time of the injury. [*Parke*, B.—The declaration states, that the possession was in Heywood, and the reversion in the plaintiff. Does that mean the legal or actual possession?] It is submitted, that the actual possession is meant. As to the measure of damages, the jury ought not to have given the value of the plaintiff's interest in the land, and also in the building, which they clearly have done, as the Company will still have to purchase her interest in the land. The true measure of damages is the injury sustained by the removal of the premises: *Jones* v. *Gooday* (*b*).

PARKE, B. (*c*).—We are of opinion that this rule must be discharged. It is contended, on behalf of the defendants, that this bond is substantially in compliance with the 8 & 9 Vict. c. 18, s. 85; but we think it is not. If the only objection had been, that, instead of being conditioned for payment to the plaintiff, it was conditioned for payment to the plaintiff, "her heirs, executors, administrators or assigns," I doubt whether it would have

(*a*) 3 Taunt. 137.
(*b*) 8 M. & W. 146.
(*c*) *Pollock*, C. B., and *Rolfe*, B., had left the Court.

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been bad on that account; because that is, in fact, implied from the nature of the bond, that is to say, that if the plaintiff dies, payment shall be made to those entitled to her estate; if leasehold, to her executors; if freehold, to her heirs; and payment to assignees would necessarily be implied from a bond conditioned for payment to a party. But, with respect to the other objection, I think that the words "or otherwise," introduced into this bond, are not authorised by the statute. The words of the statute are, that the bond is to be conditioned for "payment to the party, or deposit in the Bank of England, for the benefit of the parties interested," and no more. That is what the Legislature requires to be done, before a Company like this are authorised to enter and take possession of a person's land; they cannot do so until they have given such a bond; but, by the course which the Company have adopted, they may have thrown difficulty in the way of suing on this bond, which empowers payment to be made to the Bank of England, "or otherwise," supposing that the statute authorised such a bond to be given. But the 85th clause of this statute expressly requires the bond to be conditioned for payment to the party, or into the Bank of England, which is what has been called a deposit. I think, therefore, that the bond is not in compliance with the statute (*a*). Then, as to the question on the second plea, the true meaning of the averment in the declaration is, not that the land was in the actual possession of the tenant at the time when the trespasses were committed, but that there was, at that time, in the tenant a right to the possession in point of interest, so that the plaintiff could sue as reversioner; and that is proved—for the tenant's interest continued, although she allowed the Company to take possession. No assignment of her interest was ever made to

(*a*) See *Langham* v. *The Great Northern Railway Company*, ante, p. 263.

the Company, and, therefore, that interest continued in her; and that is all that is requisite to support an action by the reversioner—not such an actual possession as would maintain trespass, but sufficient legal interest to support the plaintiff's interest as reversioner. In the case of *Vowles* v. *Miller* (*a*) it was quite different, for the only question there was, whether the plaintiff was entitled to recover under an allegation that the premises were at the time of the injury in the possession of a certain tenant, and it appeared that he had ceased to occupy them before action brought; and the Court properly said, it was quite immaterial in whose possession they were at that time. The plaintiff is therefore entitled to retain her verdict on the second issue. As to the question of damages, we will take time to consider our judgment, so as to give the parties an opportunity of coming to some arrangement, which is very desirable.

ALDERSON, B., concurred.

Cur. adv. vult.

No arrangement having been come to, the judgment of the Court on the last point was delivered by

PARKE, B.—The remaining question in this case is, what is the proper measure of damages for the injury done to the plaintiff's reversion in these premises. It is doubtful on what principle the jury have calculated the damages; but the proper measure is, by how much less would the reversion sell, in consequence of the injurious act of the defendant. It is clear that they have not proceeded on that ground. The reversion is rendered of less value, because, instead of the house and land, the plaintiff has only a vacant piece of ground; and the jury should only have considered how much less that land was worth in consequence of the wrongful act of the defendant.

Rule absolute.

(*a*) 3 Taunt. 137.

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COURT OF QUEEN'S BENCH.

Trinity Term, 1848.

May 2nd.

DAILS *v.* LLOYD and Another.

The defendants, who were share-brokers, on the 30th of August, 1845, bought for the plaintiff, also a sharebroker, thirty-eight T. shares, at 2*l.* 8*s.* 6*d.* per share for the next account day, 15th of September, and sent him an advice note to that effect. The 2*l.* 8*s.* 6*d.* was premium, and did not include the deposit, none being then paid, the scrip not having then issued. By the custom of brokers, if the deposit is paid before the account day, it is added to the price. The defendants subsequently paid the deposits to the vendors. On the 19th of September, the defendants sent in their account to the plaintiff, but, by mistake, omitted to charge him with the amount of the deposits; the plaintiff sold the shares at 2*l.* 8*s.* 6*d.* per share, and at that rate was paid.

THIS cause was tried before *Alderson*, B., at the York Spring Assizes, 1847, when a verdict was taken for the plaintiff, subject to a special case to be settled by a barrister.

The case set out the pleadings. The declaration was in assumpsit, for the price of railway shares, for money paid, for money had and received, and on an account stated. Pleas,—non assumpserunt, payment, and set-off.

The particulars of demand contained various items for money and shares, and, amongst others—

	£	s.	d.	£	s.	d.
"1845.						
"Sept. 26.—To eighty South Staffords . . .	560	0	0	—		
Less commission .	10	0	0			
				550	0	0
"Oct. 7. — Twenty-five Tean and Doves . . .	84	7	6	—		
Less commission .	1	17	6			
				82	10	0"

On the 18th of September, the defendants bought for the plaintiff eighty S. shares, at 4*l.* 10*s.* per share, which did not include the deposit, and sent him an advice note with that sum as the price. The defendants subsequently paid the vendors the amount of deposit, 200*l.* On the 26th of September, the defendants sold the shares for the plaintiff at 7*l.* per share, which included the deposit; and in the accounts rendered to the plaintiff by the defendants, he was credited with the amount, but was only debited with the premium. The plaintiff acted as broker for other parties, and settled with them upon the footing of the advice notes, and of the prices charged in those notes, being the full price of the shares:—

Held, that the defendants were entitled to set off the amounts paid by them for deposits, and were not concluded by their omission, by mistake, to charge him with those payments.

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and claiming a balance due to the plaintiff, after allowing various matters of set-off, of 605*l.* 14*s.* 10*d.*

The particulars of set-off contained, amongst other items, the following:—

"1845.	£	s.	d.
"August 30.—Thirty Tean and Doves, at 2*l.* 8*s.* 6*d.*	72	15	0
"Sept. 19.—Eighty South Staffords, at 4*l.* 10*s.* .	360	0	0"

The defendants paid deposits on the eighty South Staffords purchased by them for the plaintiff, on the 19th of September, amounting to 200*l.*; and they also paid a deposit on the thirty Tean and Doves, bought by them on the 30th of August, but never charged the plaintiffs with the deposits so paid by them, of 1*l.* 7*s.* 6*d.* per share, amounting to 41*l.* 5*s.* The plaintiff was a sharebroker at Goole, in Yorkshire; the defendants were sharebrokers at Liverpool. Various dealings in railway shares had taken place between the plaintiff and the defendants, and, though acting as brokers, they were responsible to each other, as principals, for the due performance of contracts entered into between them.

First, with respect to the Tean and Dove shares. On the 29th of August the plaintiff instructed the defendants to buy for him, on the following day, at the lowest price they could, thirty Tean and Dove shares. The defendants bought thirty shares on the following day of Messrs. Schroeder & Ashlin, at 2*l.* 8*s.* 6*d.* per share, and sent the advice note to the plaintiff, as follows:—

"Bought for Mr. J. Dails, Goole.

"Thirty Tean and Dove Valley Railway Shares, at 48*s.* 6*d.*	£ 72	s. 15	d. 0
"Commission, 6*d.*	0	15	0
"Aug. 30, 1845.	L. & P.		

"For account day, 15th September."

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The following is a copy of the sold note from Messrs. Schroeder & Ashlin to the defendants:—

"To Messrs. Lloyd & Price.

"*August* 30, 1845.

"We have this day sold to you thirty shares in the Tean and Dove Railway Company, at 2*l.* 8*s.* 6*d.* per share premium.

"SCHROEDER & ASHLIN."

On the 30th of August the scrip in the Tean and Dove Valley Railway had not issued. The price, 2*l.* 8*s.* 6*d.*, which the defendants contracted to pay Messrs. Schroeder & Ashlin, did not include the deposit, the course of business being, when the scrip had not issued, and consequently the deposit not paid, to buy and sell at a price per share, without including the deposit; and if the scrip was issued and the deposit paid previous to the account day, the deposit was added to the price. The Liverpool printed Share-lists would show whether the price, at any time, included the deposit. The deposit (1*l.* 7*s.* 6*d.* per share) was first entered in the share-lists on the 2nd of September, the deposit having been paid on the 1st.

On the 19th of September the defendants rendered an account to the plaintiff, in which the latter was debited (August 30), thirty Tean and Doves, 2*l.* 8*s.* 6*d.*, 72*l.* 15*s.*; and the balance, as appeared by that account, was 231*l.* 13*s.* 9*d.* This account was accompanied by a letter from the defendants, requesting a remittance. In addition to the price of 2*l.* 8*s.* 6*d.*, the defendants paid Messrs. Schroeder & Ashlin the deposit, 1*l.* 7*s.* 6*d* per share. This deposit has never been charged in account to the plaintiff at all. In the other transactions in the Tean and Doves, which appeared by the account to have taken place after the issuing of the scrip, the price included the deposit.

The plaintiff, in purchasing the Tean and Doves, acted as broker for other persons; and he rendered them advice

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notes of the purchases made by the defendants for him; and he charged them the same price as was mentioned in the advice-note of the defendants, and as was charged by the defendants to him; and the plaintiff did not charge his principals for the shares anything beyond the 2*l.* 8*s.* 6*d.* per share and his commission; and, on the footing of that price, settled by payments with his principals, before the defendants made any claim on him for the deposit. The Liverpool Share-lists were daily sent by the defendants to the plaintiff during the period over which the account extended. The above balance of 231*l.* 13*s.* 9*d.* was carried forward into the subsequent accounts.

As to the South Staffords, on the 18th of September, the plaintiff gave the defendants by letter the following order:—

"Please buy, as low as you can, fifty South Staffords for me; and, if not exceeding 5*l.*, you can buy eighty."

The defendants, acting on this order, bought eighty shares, and sent the following advice notice:—

"Bought for Mr John Dails, Goole.

Eighty South Stafford Railway Shares, at 4*l.* 10*s.*	£360	0	0
Commission, ditto, 1*s.* 6*d.*	6	0	0
	£366	0	0

"For account day, Sept. 30, E. E.
Liverpool, Sept. 19."

Of these eighty shares, the defendants bought fifty of Messrs. Forsyth & Hamilton, and thirty of Messrs Neile; and the following are copies of the sold notes of the respective vendors:—

"To Messrs. Lloyd & Price.

"Sir,—We have this day sold to you fifty shares in the South Staffordshire Railway, at 4*l.* 10*s.* per share; net premium paid, nil. Premium, 4*l.* 10*s.*

"Yours, &c.

"FORSYTH & HAMILTON."

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"To Messrs. Lloyd & Price.

"We have this day sold to you thirty shares in the South Staffordshire Railway, at four-and-a-half per share, namely, £— paid. Premium, 4*l.* 10*s.*

"Yours, &c.

"F. & J. NEILE."

The scrip in the South Staffordshire shares began to be issued on the 18th of September, 1845, at Walsall. During the first three days the issue was to the allottees at Walsall and the neighbourhood. The original deposit was 1*l.* 7*s.* 6*d.* per share; but, in compliance with the standing orders of the House of Lords, the deposit was, by a resolution of the provisional committee, passed on the 22nd of September, 1845, increased to 2*l.* 10*s.*, the shares being 25*l.* shares. The first deposit of 1*l.* 7*s.* 6*d.* per share on the letters of allotment of the South Staffordshire shares, purchased by the defendants for the plaintiff, had been paid on the 14th of August, 1845, and the second deposit on the 28th, 18th, and 19th of September in that year. The price, 4*l.* 10*s.*, at which the defendants contracted to buy, did not include the deposit, or any part thereof. The prices quoted in the Liverpool Share-list of the 19th of September were 4*l.* 10*s.* and 4*l.* 15*s.* In settling with the vendors for the shares, after the scrip had issued, the defendants paid them 2*l.* 10s. in addition to the above sum of 4*l.* 10*s.* per share. On the 26th of September, the defendants received instructions from the plaintiff to sell eighty South Staffords; and they sold them on that day at 7*l.* per share, and sent the following advice note:—

"Sold for John Dails, Goole.

Eighty South Stafford Railway Shares, at 7*l.*	£560	0	0
Commission on ditto, 2*s.* 3*d.*	10	0	0
	£550	0	0

"For account day, Oct. 15, E. E.

Liverpool, Sept. 26, 1845."

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On the 2nd of October, the defendants forwarded to the plaintiff an account of transactions between them up to the 30th of September. In this account, which was set out in the case, the plaintiff was debited with the 360*l.* for the purchase of the South Staffordshires, and it shews a balance in the defendant's favour of 141*l.* 2*s.*; it contained the purchase only, and not the sale of the eighty South Staffords (the sale being for a subsequent account), and the price charged was 4*l.* 10*s.* per share. On the 13th of October, the defendants forwarded to the plaintiff an account of transactions between them up to that date. That account commenced by debiting the plaintiff with the 141*l.* 2*s.*, the balance of the former account; and it credited him with the 560*l.* in respect of the sale of the eighty South Staffords, and left a balance of 941*l.* in the plaintiff's favour. The selling price (7*l.*) charged for the South Staffords shares included the deposit of 2*l.* 10*s.* On the 31st of October, the defendants forwarded the plaintiff the following account of transactions between them up to that date:—

John Dails, Esq., Goole, in account current with Lloyd & Price, Liverpool.

1845.		£	s.	d.
Oct. 17.	Cash	855	7	8
— 13.	Commission of Goole and Doncaster, at 2*s.* 6*d.*	5	0	0
	Balance	386	8	10
		£1246	16	6

1845.		£	s.	d.
Oct. 13.	Balance of accounts rendered . . .	941	16	6
	Forty Goole and Doncasters . . .	305	0	0
		£1246	16	6
Oct. 27.	Balance	£386	8	10

The plaintiff had not been charged in account at all with anything beyond the 4*l.* 10*s.* per share for the South Staffordshire shares. The plaintiff, in buying and selling the South Staffordshire shares, acted as broker for other

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parties; and he rendered advice notes to them, and settled by payment with them upon the footing of the advice notes sent to him by the defendants, treating the purchased price charged in these notes as the full price of the shares. The settlement by payment was before the defendants made any claim upon the plaintiff in respect of the deposit upon the shares. The Liverpool share lists contained no entry in the column for money paid on account of South Staffordshire shares, until the 26th of September, when the 2*l.* 10*s.* per share was entered for the first time as paid. The omission by the defendants to make any reference in the accounts before mentioned, to the deposit paid by them on the Tean and Dove shares, and on the South Staffordshire shares, in addition to the price, was occasioned by mistake. On the 18th of November, the plaintiff addressed a letter to the defendants, stating the balance on the account current to be 605*l.* 14*s.* 10*d.*, and requesting payment. On receipt of this letter the defendants examined their books, and then first discovered their mistake with regard to the deposits; and on the 19th they addressed to the plaintiff the following letter:—

"Dear Sir,—We are in receipt of yours of yesterday, annexing a statement of your account, which is not complete. According to your statement, we stand debtors for 605*l.* 14*s.* 10*d.*; but on September 19th, we paid deposit on eighty South Staffordshires, amounting to 200*l.*; and in August 30th, we purchased for you thirty Tean and Doves, at 2*l.* 8*s.* 6*d.* premium, but never charged you with the deposit of 1*l.* 7*s.* 6*d.* per share, amounting to 41*l.* 5*s.*; which leaves a balance of 364*l.* 9*s.* 10*d.*, according to our statement, which is correct. We inclose sundries, as at foot, for 364*l.* 9*s.* 10*d.*, to square this account," &c.

In answer to this the plaintiff, on the 20th of November, wrote to the defendants:—

"Dear Sirs,—I have yours of yesterday's date, accompanying cash, &c., value together, 364*l.* 9*s.*, which amount

is passed to your credit. The claim you make for South Staffords and Tean and Doves shall be laid before the parties concerned, two of whom are from home at present; but I really cannot allow you thus summarily to make the deductions from our present settlement for other transactions. I do, therefore, hope that you will see the justice of immediately remitting the balance of 241*l.* 5*s.* still remaining due to me; and waiting which, I am," &c.

The defendants, on the 21st of November, wrote to the plaintiff, stating that the deposit paid was only what was paid when the shares were taken up, the purchase having been made by them prior to the scrip being issued, and the deposit consequently not being in the lists; and adding, "This your client will see, on reference to the list, and will not hesitate to settle with you." This letter was followed by another from the plaintiff to the defendants, giving the names of purchasers of the shares, and making a demand of payment of the 241*l.* 5*s.*

The question for the opinion of the Court was, whether the defendants could avail themselves in this action, in any form, of the deposits on the Tean and Dove and South Staffordshire shares, amounting together to the sum of 241*l.*, paid by them to the persons from whom they bought those shares, in addition to the price charged by them in their advice-notes and in the accounts sent to the plaintiffs. If they could avail themselves of that sum, then the plaintiff had been fully paid his demand, and a verdict was to be entered for the defendants on the second and third issues; if they could not so avail themselves, then the verdict was to be entered for the plaintiff, on all the issues, for the sum of 241*l.* 5*s.*

Baines, for the plaintiff (*a*).—The defendants' negligence

(*a*) Before Lord *Denman*, C. J., *Patteson*, J., *Wightman*, J., and *Erle*, J.

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has caused a loss, and as no fraud is imputed, that loss ought to fall on the party through whose negligence it has been caused: *Skyring* v. *Greenwood* (*a*); *Bramston* v. *Robins* (*b*); *Marriott* v. *Hampton* (*c*); *Shaw* v. *Dartnall* (*d*). The plaintiff has been led to alter his position by the conduct of the defendants, who are estopped from alleging the existence of a different state of facts to those represented: *Thomas* v. *Hawkes* (*e*); *Cox* v. *Prentice* (*f*); *Heane* v. *Rogers* (*g*); *Pickard* v. *Sears* (*h*); *Gregg* v. *Wells* (*i*).

Cowling, contrà.—The amount of the set-off has never been paid, and therefore is still owing. As to the Tean and Dove shares, both parties, being brokers, must have known that the price agreed did not include the deposit. The defendants have made a mistake in their charge, and are now entitled to rectify it: *Fletcher* v. *Marshall* (*k*); *Sutton* v. *Tatham* (*l*); *Bayliffe* v. *Butterworth* (*m*). If the defendants were to sue the plaintiff for the deposits paid, he could not have any defence to the action: *Willoughby* v. *Backhouse* (*n*); *Marriott* v. *Hampton* (*o*). As to the South Staffordshire shares, the plaintiff has actually been credited with the amount of the deposit in the account of the subsequent date.

Baines, in reply

Cur. adv. vult.

8th June. Lord DENMAN, C. J., now delivered the judgment of the Court.—The only question in this case was, whether the

(*a*) 4 B. & C. 281.
(*b*) 4 Bing. 11.
(*c*) 7 T. R. 269; *S. C.*, 2 Smith's Lead. Cas. 237.
(*d*) 6 B. & C. 56.
(*e*) 8 M. & W. 140.
(*f*) 3 M. & Sel. 344.
(*g*) 9 B. & C. 577.
(*h*) 6 A. & E. 469.
(*i*) 10 A. & E. 90.
(*k*) Ante, p. 340; 15 M. & W. 755.
(*l*) 10 A. & E. 27.
(*m*) Ante, p. 283.
(*n*) 2 B. & C. 821.
(*o*) 7 T. R. 269; *S. C.*, 2 Smith's Lead. Cas. 237.

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defendants were entitled to set off a sum of 200*l.*, paid by them for deposits on eighty shares in the South Staffordshire Railway, purchased by them for the plaintiff, and a further sum of 41*l.* 5*s.*, paid by the defendants for deposits on thirty shares in the Tean and Dove Railway, purchased by them for the plaintiff.

Upon looking at the accounts between the parties, as stated in the case, it seems to us to be clear, that the defendants are entitled to set off the 200*l.* paid by them for deposits upon the eighty shares in the South Staffordshire Railway, as the plaintiff has actually had the full benefit of that payment allowed to him in account, though the defendants have, by mistake, omitted to charge him with it on the debit side of the account. In the account sent by the defendants to the plaintiff on the 2nd October, 1845, they charge him with 360*l.* as the purchase-money for the eighty South Staffordshire shares, at 4*l.* 10*s.* a share, omitting to charge him with 2*l.* 10*s.* per share more, which they had paid for deposits; but in the subsequent account of the 13th of October, 1845, they gave him credit for 560*l.*, as the produce of the same shares which they sold for the plaintiff at 7*l.* a share, which included the 2*l.* 10*s.* per share paid by them for deposits beyond the premium of 4*l.* 10*s.* per share. There is, therefore, no reasonable ground for contending that the defendants are not entitled to set off that 200*l.*

The right to set off the 41*l.* 5*s.* on account of the Tean and Dove shares, is not quite so clear. Those shares were purchased by the defendants for the plaintiff on the 30th August, 1845, at 2*l.* 8*s.* 6*d.* per share, and the bought note was sent to the plaintiff with that sum as the price; the 2*l.* 8*s.* 6*d.* was only the premium per share, no deposit being then paid, as the scrip was not issued. The shares were bought for the plaintiff for the account day, which was the 15th of September; and, by the custom of share-brokers, if the deposit was paid before the account day, it

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was added to the price. The plaintiff was a sharebroker, but dealt with the defendants, as the principal; and the fact of his being himself a broker is not otherwise important, than as shewing that he would be cognisant of the course of dealing in the share market, with respect to payment of deposits upon shares. As the scrip of the Tean and Dove shares had not come out on the 30th of August, when the purchase was made, it must have been clear to the plaintiff that the deposit had not been paid at that time, and consequently was not included in the price of 2*l.* 8*s.* 6*d.* per share. In the ordinary course of business, the payments made by the defendants on account of the deposits would not appear as a charge against the plaintiff until the 19th September, when the first account was rendered: it is not, however, charged to the plaintiff in that account, nor in any other, owing to a mistake; and the question is, whether the defendants are concluded, by that omission, from charging the plaintiff with the payment of the deposit as an item of set-off, because he has himself sold to other persons at the price paid for premium only, and has at that rate been paid and settled with by those persons.

The precise nature of the dealing between the plaintiff and his principals does not appear upon the case, nor is it stated that the scrip was ever transferred by the plaintiff; for all that appears, it may have been a mere time bargain, and the scrip may still be in the hands of the plaintiff. If the scrip was actually transferred by the plaintiff, he must have known, or ought to have known, that the price he paid was premium merely, and could not have included any sum paid for deposit. In either view of the case, we think that the defendants are entitled to set off the amount, which by the course of business they were bound to pay, beyond the premium, in order to procure the scrip; and that the omission to debit the plaintiff with such payment in their accounts, does not take away their right. They dealt with the plaintiff as the principal in the transaction,

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and are not concluded by having, by mistake, omitted to charge him with a payment, of which he has had the benefit by the actual possession of the scrip, which could only have been obtained by the payment in question. The case of *Sutton* v. *Tatham* (*a*), as well as the other cases cited in the argument, are consistent with this view we take of the case; and our judgment, therefore, is in favour of the defendants.

Judgment for defendants.

(*a*) 10 A. & E. 27.

COURT OF EXCHEQUER.

Hilary Term, 1849.

Dec. 8*th*, 1848. · *Jan.* 17*th*, 1849.

COX *v.* THE MIDLAND RAILWAY COMPANY.

ASSUMPSIT for surgical attendance. Plea, non assumpserunt.

At the trial before *Maule*, J., at the Spring Assizes, 1848, for the county of Warwick, it appeared that one Higgins, a third-class passenger on the line, at the Whittaker station, whilst getting into a carriage by the direction of one of the servants of the Company, was thrown down, owing to the sudden moving on of the train, and the wheels passed over his leg; that the railway guard immediately called in Mr. Davis, the usual surgeon of the Company, and he deeming the case a serious one, desired further medical assistance. The son of Mr. Davis was sent

The employment of an agent for a particular purpose gives only the authority necessary for that agency under ordinary circumstances. Therefore, as it is not incident to the employment of a railway guard or station-master, to enter into a contract with a surgeon to attend a passenger accidentally injured on a railway, the Railway Company are not liable for services so rendered by a surgeon under such a contract.

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to Birmingham by a special train; the station-master at that place desired that every attention should be paid to the man; and, in consequence, the plaintiff, an eminent hospital surgeon at Birmingham, was sent by a special train to Whittaker, where he performed the operation of amputation upon Higgins. It was shewn, that, on three former occasions, the Company had paid the bills of medical men for attending upon persons who had been injured on their railway; but it did not appear by what particular servants the attendance had been ordered in those cases. On this state of facts, it was objected, at the trial, that the Railway Company were not liable in this action: First, because, being a corporation, they could only contract under their common seal; secondly, that the authority to enter into such contracts as the present, on behalf of the Company, was not incidental to the employment of a station-master, and therefore they were not bound. The learned judge left the case to the jury, who found a verdict for the plaintiff; leave being reserved to the defendants to move to enter a nonsuit, on the above grounds.

Humphrey, Q. C., in Easter Term, 1847, obtained a rule nisi accordingly.

Whitehurst, Q. C., and *Hayes*, now shewed cause (*a*), and contended, that the rule of law, that a corporation can only be bound by an instrument under their common seal, was subject to exceptions. Thus, the duly appointed servant of a corporation may bind them, not only by all acts done within the ordinary scope of his authority, but on matters arising on sudden emergency, and urgently requiring immediate attention, where the want of such attention would be productive of injury to the corporation itself: *Manby* v. *Long* (*b*); Com. Dig. "Franchise" (F), 13, n. (*w*), last edit.

(*a*) Dec. 8, 1848, coram *Parke*, B., *Rolfe*, B., and *Platt*, B.
(*b*) 3 Lev. 107.

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Secondly, a corporation may, without deed, give command to do certain small acts, not worth the trouble of a deed, as to make a distress, &c.: *Anonymous case* (*a*). Thirdly, the officers of trading corporations have power to do, on their behalf, all acts reasonably necessary to enable them to carry on their business: *Yarborough* v. *The Bank of England* (*b*); *Hall* v. *The Mayor of Swansea* (*c*); *Beverly* v. *The Lincoln Gas Company* (*d*); *Church* v. *The Imperial Gas Company* (*e*); *Gibson* v. *The East India Company* (*f*), *Tindal*, C. J.

K. Macaulay, in support of the rule, contended that the cases in which corporations may at common law, without deed, do certain small acts, was to be understood of corporations aggregate, with a head; that, if the argument for the plaintiff was correct, then every servant of a Railway Company, through whose negligence an accident has occurred, may bind his employers by a contract with any person whom he may choose to call in to repair the mischief. If that were so, then a gentleman's coachman who drives over and injures a foot-passenger, might on the spot employ a surgeon to attend him, and render his master liable for payment of the surgeon's bill.

Cur. adv. vult.

Jan. 17*th*.

Parke, B., now delivered the judgment of the Court. —This case was tried before my Brother *Maule*, at the last Spring Assizes for Warwick. The learned judge reserved leave to enter a nonsuit; and, a rule nisi having been granted, the case was fully argued at the sittings after last term. The facts appeared to be these:— One Higgins, a labourer, met with an accident from the moving of a truck on the defendants' railway. The rail-

(*a*) 1 Salk. 191.
(*b*) 16 East, 6.
(*c*) 5 Q. B. R. 526.
(*d*) 6 A. & E. 829.
(*e*) Id. 846.
(*f*) 5 Bing. N. C. 270.

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way guard applied to a Mr. Davis, a surgeon in the neighbourhood, who found the case a serious one, and wished to have the assistance of an eminent hospital surgeon at Birmingham. The son of Mr. Davis informed the station-master at Birmingham, who had, according to the evidence, acted as chief officer there, in the passenger, and indeed in every department, and he directed that every attention should be paid to the man. The plaintiff was accordingly requested by Davis to perform the operation of amputation, which he did successfully, and, in this action, sought to recover compensation for that service from the Company. If the station-master was authorised to enter into such a contract, there was, no doubt, evidence to go to the jury that he made the contract on which the action was brought. The principal question is, had he such authority?

The learned counsel for the defendants contended, that they were not liable, because, being a corporation, they could only contract under their common seal. To which it was answered—first, that a corporation aggregate may give personal command to do small acts without a deed, as to retain a servant, cook, or butler, for ordinary services; and that the species of employment of the servant who gave the order to the plaintiff fell under that description, and that he was authorised, from the nature of that employment, to bind the corporation by such a contract as would be inferred from that order; and, secondly, that, if the corporation could not bind themselves by such employment, and the contract incident to it at common law, they could, by virtue of the statute constituting them a corporation for the purpose of constructing and maintaining a railway, if they thought proper to carry on upon it the trade of carriers of passengers and goods for hire; for then, it must be incident also to such a corporation to appoint servants of various sorts; that, on reference to the act of Parliament, 6 Will. 4, c. lxxviii, they had

this power, and probably without an instrument of appointment under seal; and that, considering the nature of the railroad traffic, each of these servants had, as incidental to his employment, an authority, in case anything occurred which would be prejudicial to the interests of the Company, to do what was reasonably fit to be done under the circumstances, to remedy or diminish the damage done. It was contended, therefore, that, if one of these servants happened to be near at the time of the slip of an embankment, which, for the purpose of securing the safe and speedy traffic along the railroad, ought to be immediately removed, he would have an implied authority, where fresh labourers were required, to bind the Company by a contract to pay them; and that, in like manner, any servant who was near, or, at all events, the head servant of the nearest station, would be authorised, if a passenger received personal damage requiring immediate surgical attendance, to contract with a surgeon, and to bind the Company by that contract to pay what was reasonably due to him, such authority being an incident to his employment, considering its peculiar nature, and it being for the benefit of the Company that the damage, and consequent loss to them, from an occurrence for which they were responsible, should be as much mitigated as possible; and further, it was contended for the plaintiff, that, if such an authority was not incidental to the employment of a railroad servant, there was evidence in this case of its having been given by the directors, to whom the management of the business of the Company was, by the act of Parliament establishing it, conferred. That evidence consisted of payments by the Company, on three other occasions, of bills of surgeons, not of the plaintiff, for attending persons who had been hurt on the railroad.

We intimated our opinion in the course of the argument, that these instances of payments did not afford sufficient evidence to go to the jury, of a special authority to make the contract in question. One of the in-

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stances of payments was the case of an injury to a passenger, before the railroad belonged to the defendants; the second was an injury to a railway servant; the third was uncertain; but what particular servant gave the order in each case did not appear. These payments were evidence of an authority given to the servants who gave the orders, to make these particular contracts. If they were evidence of a general authority to those particular servants to make such contracts, they were certainly not evidence of a similar general authority to all their servants. It is obvious that the Company might choose to intrust one servant with such powers, and not another. The question, therefore, does not turn upon these special circumstances, but depends upon the authority of the servant who gave the order.

On the part of the defendants it was insisted, that neither at common law, nor under the statute, was such a power given to them as to bind themselves by contract not under seal; that the common law power to do small acts, not under seal, was limited to a corporation with a head; that, although the statute might give this corporation the power to enter into some contracts, and the power even to appoint some servants, without deed, in the management of its concerns, yet the authority to enter into such contracts as this with a surgeon, was not incident to the employment of the servant who made it. This is, in truth, the only point in the case; and we are all of opinion, that the power to enter into this contract was not incident to the employment either of the guard or superintendent. The simple employment of persons by a corporation carrying on business cannot give them, as incident to that employment, a larger authority than if the same appointment were made by a partnership of as many individuals as the shareholders of the Company; nor does it appear to us to make any difference that it is carried on by fewer members, or even by a single indi-

vidual. A partnership of many, who do not mean to act personally in the management of their own affairs, may think it right to invest some of their servants with all or part of the powers and authorities of partners; but, supposing they do not (and there was no evidence of such an authority in the present case to any but the directors, who possessed, by statute, the management of the affairs of the Company), the functions and authorities of servants in different capacities must be the same in both cases. The power and duty of an engine-driver must be the same, simply as such, whether he be employed by a corporation or a joint-stock company, or an ordinary partnership, or an individual, all of whom may carry by the railroad. The driver appointed by a corporation, or company, or partnership, carrying on the business of carriers of passengers or goods, must, as such, have the same duties and powers. It is not easy to decide whether unforeseen accidents would occur more frequently in the carriage of passengers by locomotive power on railroad, than by carrying the like number by coach on ordinary roads. Certainly, there is no such difference, so as to make the duties of an engine-driver and coachman different, as to the power of making such contracts as that in question, nor the duties of porters, clerks, and other servants connected with the carrying department. Could it be maintained that a coachman, from whose carriage a passenger had fallen and broken his arm, or by which another person had been run over,—or even the horse-keeper who happened to be near, or the book-keeper, could bind his master by a contract with a surgeon to cure the injured person, and oblige his master to pay the bill? We are of opinion that he could not. Though it might be a benefit to the master to have the damage diminished by a speedy cure, if he was really liable for that damage, it would be a prejudice to him to be bound to pay if he was not; and is the servant to decide whether his master is liable or not—a man whom he has

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not appointed with any view to the exercise of such a discretion? We think the servant has clearly no such power. The employer of an agent for a particular purpose gives only the authority necessary for that agency, under ordinary circumstances, as this Court held in the case of an agent to a mine, where the question was, as to his power to bind his principals by borrowing money, when an emergency arose in which it was highly expedient to do so; and it was held that he had no such power: *Hawtayne* v. *Bourne* (*a*). The employment of an agent gives also the power usually exercised by similar agents; but there was no evidence of any usage in this case. We therefore think the Company are not liable, whether we suppose the railway guard, or the superintendent at the station, to be the person making the contract. It is not to be supposed that the result of our decisions will be prejudicial to railway travellers who may happen to be injured. It will rarely occur that the surgeon will not have a remedy against his patient, who, if he be rich, must at all events pay; and if poor, the sufferer will be entitled to compensation from the Company, if they, by their servants, have been guilty of a breach of duty, out of which he will be able to pay the surgeon's bill; for that is always allowed for in estimating the damages. There will, therefore, be little mischief to the interest of the passengers—little to the benevolent surgeons who give their services. But it would be a serious inconvenience to the public, if the rule of law as applicable, not merely to railway companies, but to all partnerships and individuals, as to the extent of authority given to an agent, were relaxed out of a compassionate feeling, which it is difficult not to entertain, towards the suffering party, the present plaintiff. The rule, therefore, will be absolute to enter a nonsuit.

Rule absolute.

(*a*) 7 M. & W. 595; *S. C.*, 10 L. J., N. S., Exch., 224.

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BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

Ex parte THE RECTOR OF LOUGHTON, *Re* THE LONDON AND BIRMINGHAM RAILWAY COMPANY ACT. *June 12th.*

Under the London and Birmingham Act, the costs of a second re-investment in land, and of the conveyance and petition, allowed, and 14*l.* residue of money in court ordered to be paid to the petitioner for his own use.

THIS was a petition presented by the Rector of Loughton, in Buckinghamshire, stating that the above-named Company had, under the powers of their act, taken six acres of the glebe, and paid the purchase-money into court, which had been, under an order of the Court, invested in Consols. That the greater part of the money in court had been laid out in the purchase of land, leaving a sum of 20*l.* 9*s.* Consols (less than 20*l.* sterling) to the credit of the petitioner. The petition prayed that the fund in court might be sold; that 6*l.*, part of the proceeds, might, upon the execution of a proper conveyance, be paid to a person with whom the petitioner had contracted for the purchase of a slip of land; that the residue might be paid to the petitioner; and that the Company might pay the costs of the application.

Mr. *Forster* appeared for the petitioner.

Mr. *Speed*, for the Company, contended that, although, under the Birmingham Railway Act, the Company might have to pay the costs of two investments, yet they would not be liable to pay the costs of payment of money out of court, which was, in fact, the main object of the present petition. That the petitioner was not entitled to have the residue of the sum in court, although less than 20*l.*, paid out to him, as the clause(*a*) in the act clearly had refer-

(*a*) 3 Will. 4, c. xxxvi. sect. 41. "That, when any money so agreed or awarded to be paid, as last hereinbefore mentioned, shall not exceed the sum of 20*l.*, the same shall be paid to the respec-

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ence to cases in which the whole purchase-money, and not the residue, was less than 20*l.*

The VICE-CHANCELLOR said, he was of opinion that it was not unfair to treat this as a simple case of a second investment, and that it would not be a forced construction of the act to decide that the residue of the sum, after payment of the purchase-money, might be paid to the petitioner. The order was then made according to the prayer of the petition; the costs of the re-investment, and of the conveyance, to be paid by the Company.

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In re HORE'S ESTATE AND THE SOUTH DEVON RAILWAY COMPANY.

Where a suit has been instituted to establish the right of a person claiming a sum in court, the proceeds of land taken by a railway company, the Court will, on application for payment of the fund, order the costs of the person entitled, but not those of the other parties to the suit, to be paid by the Company.

IN 1845, the Company being unable to agree with the surviving trustee under the will of a Mr. Hore, for the purchase of some land, had the value assessed by a jury, and paid the amount (360*l.*) into court. Subsequently, a suit was instituted by an annuitant under the will of Mr. Hore, for the payment of the arrears of her annuity. By a decree in 1847, the annuity was declared to be charged upon the corpus of the real and personal estate of the testator. The present petition was presented by the annuitant for the payment of the sum of 360*l.* to her, in part discharge of the arrears of the annuity.

tive parties, who would, for the time being, have been entitled to the rents and profits of the lands so taken or used for the purposes of the act, for their own use and benefit," &c.

Sect. 42. "That, where, by reason of any disability or incapacity of any party entitled to any lands to be taken or used, &c., the purchase-money for the same shall be required to be paid into the Bank of England, to be applied in the purchase of other lands to be settled to the like uses, in pursuance of this act, it shall be lawful for the said Court to order the expenses of all such purchases, or so much of such expenses as the said Court shall deem reasonable, together with the necessary costs and charges of obtaining such order, to be paid by the said Company," &c.

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The other parties in the cause were served with the petition, and appeared by counsel.

Mr. *Bourdillon*, on behalf of the Company, objected to the payment of more than one set of costs by the Company; contending that, had the suit not been instituted, the trustee under the will could have petitioned the Court for payment of the money to him, and his would have been the only costs; that the necessity of serving the different defendants was occasioned by the suit, and that these came within the exception contained in the latter part of the 173rd section of the South Devon Railway Act (*a*).

Mr. *Messiter*, contrà.

His HONOR was of opinion, that the Company could only be called upon to pay such costs as they would have been liable to pay, had the suit not been instituted; and that

(*a*) The words of the 173rd section of the 7 & 8 Vict. c. lxviii., are, in part, the same as those of the 80th section of the Lands Clauses Act:—"That the Court of Chancery may, in all such cases except where monies shall have been so deposited by reason of the wilful refusal of any party entitled thereto, to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or the failure or neglect of any party to make a good title to the land required, order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the Company; (that is to say), the costs of the purchase, or of the taking or using of the lands, or which shall have been incurred in consequence thereof, other than such costs as are hereinotherwise provided for, and the costs of the investment of such monies in Government or real securities, and of the reinvestment thereof, or of the Government or real securities purchased therewith, in the purchase of other lands; and also the costs of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the Government or real securities upon which such monies shall be invested; and for the payment out of court of the principal of such monies, or of the Government or real securities whereupon the same shall be invested, and of all other proceedings relating thereto, except such as are occasioned by litigation between adverse claimants."

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the appearance of the several defendants upon the petition having been rendered necessary by the institution of the suit, the Company were not liable to pay their costs, which came within the exception of the 173rd section (*a*).

(*a*) See *Re The Hull and Selby Railway Company*, ante, p. 458.

BEFORE VICE-CHANCELLOR KNIGHT BRUCE AND THE LORD CHANCELLOR.

Feb. 16*th*. *April* 16*th*, 17*th*, & 18*th*.

Ex parte BARBER, *In re* THE LONDON AND MANCHESTER DIRECT INDEPENDENT RAILWAY COMPANY (REMINGTON'S LINE).

(*Winding-up Act* 1848).

A railway company was provisionally registered, but did not obtain an act of incorporation. The scheme having been abandoned, a petition was presented by a contributory, praying the absolute dissolution and winding up of the Company, under the 11 & 12 Vict. c. 45:—*Held* by the Lord Chancellor, reversing the decision of the Vice-Chancellor *Knight Bruce*, that such a Railway Company was within the act, and that a Court of equity had jurisdiction to make an order to the effect prayed.

THIS petition stated, that, in April, 1845, a company was projected for constructing a railway between London and Manchester, for the carriage of passengers and goods, with a capital of 3,000,000*l*., divided into 60,000 shares of 50*l*. each; and the Company was styled The London and Manchester direct Independent Railway Company. The capital was afterwards raised to 5,000,000*l*., in 100,000 shares of 50*l*. each (*a*).

(*a*) The act of the 11 & 12 Vict. c. 45, was intituled "An Act to amend the acts for facilitating the winding up the affairs of Joint-stock Companies unable to meet their pecuniary engagements, and also to facilitate the dissolution and winding up of Joint-stock Companies, and other partnerships;" and, after reciting the passing of the act 7 & 8 Vict. c. 111, intituled "An Act for facilitating the winding up of the affairs of Joint-stock Companies unable to meet their pecuniary engagements," and the similar act for Ireland, and also reciting the 9 & 10 Vict. c. 28, intituled "An Act to facilitate the dissolution of certain Railway Com-

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That the Company, both originally and with the alteration, was provisionally registered, according to the provisions of the act 7 & 8 Vict. c. 110, intituled "An Act for the Registration, Incorporation, and Regulation of Joint-stock Companies."

That the petitioner duly acquired, and then held, 200 shares in the Company, and thereon became, and then was, a member and contributory of the Company, and was entitled to a share of its assets.

The petition then stated the subscribers' agreement, wherein the object of the Company and the appointment of directors was set out, and the engagement and declaration by the subscribers with the directors to conform to,

panies," and the 22nd, 23rd, 27th, and 28th sections of the last mentioned act, [see ante, p. 224], and reciting, that it was expedient that the first two mentioned acts should be amended, and that further facilities should be given for the dissolution and winding up of joint-stock companies, and other partnerships, it was enacted as follows: "That this act shall apply to all companies corporate or unincorporate, within the provisions of either of the two acts first hereinbefore mentioned, (including all companies existing on the 1st day of November, 1844, and which shall have obtained or shall obtain a certificate of registration under an act passed in the 7th & 8th Vict. c. 110, intituled 'An Act for the Registration, Incorporation, and Regulation of Joint-stock Companies;') and to all companies which would have been within the provisions of either of the said two acts if they had not been dissolved or had not ceased to trade at the time of the passing thereof, respectively, and to all banking companies which would have been within the provisions thereof, if they had not been specially excepted from the provisions of an act passed in the session of Parliament held in the 7th & 8th years of the reign of her present Majesty, intituled 'An Act for the Registration, Incorporation, and Regulation of Joint-stock Companies;' and to all companies which, under the provisions of the said act to facilitate the dissolution of certain railway companies, shall, before the 1st day of March, 1848, have become bankrupts; and to all companies, associations, and partnerships to be formed after the passing of this act, whereof the capital or the profits is or are divided, or to be divided, into shares, and such shares transferable without the express consent of all the copartners."

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and abide by, the several rules and regulations therein contained, for the management and conduct of the said undertaking, until an act or acts of Parliament should be obtained. The first of which rules or regulations gave full power to the directors, at any board or meeting, to carry all or any part of the undertaking, as described in the parliamentary contract, into effect, to cause surveys to be made, to obtain estimates, to make contracts for those purposes, and also with canal and railway proprietors, land-owners, and others, and to buy up, purchase, and amalgamate with any railway made or projected, and generally to adopt all such measures for the benefit and furtherance of the said line as such board of directors might in their judgment consider necessary and expedient, and particularly to apply for, and seek to obtain, an act or acts of Parliament.

The 2nd and 3rd rules provided for the organisation of the board of directors and of committees.

The 4th rule gave the directors powers to appoint, suspend, or remove bankers, solicitors, engineers, surveyors, secretaries, clerks, agents, servants, and workmen, for the establishment, promotion, or purposes of the said undertaking; and also to appoint and remove any acting director or manager; and, by the 5th rule, they had power to apply the money paid as deposits in payment of salaries, in making the parliamentary deposit, in payment of the costs and expenses incurred, or to be incurred, in or about the obtaining surveys or estimates, or with reference to obtaining an act, and all other costs, charges, and expenses incident to the said undertaking, or which had been, or might be, incurred in respect or on account thereof, or relating thereto, and generally, in such manner as the directors should think most conducive to the advancement or promoting of the said undertaking.

The 6th rule gave the directors power to make bye-laws, and the 7th declared the amount of capital to be raised.

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The 8th rule provided, that a deposit of 2*l.* 15*s.* per share should be paid by each subscriber at the time of his executing the agreement, and that such further sum should be paid by each subscriber upon one month's notice of such call, provided that the whole amount should not, together with the deposit, exceed the sum of 10*s.* for every 100*l.* on the amount of every share in the capital of the Company, together with such sum as might be required by the Standing Orders of either House of Parliament, to be deposited before obtaining the proposed act of Parliament; but that, except as therein aforesaid, no further sum or deposit should be called for on account of expenses, or otherwise, until an act should be obtained, but no larger sum than 5*l.* per share should be called for at any one time; and that no more than four calls should be made in one year; and that there should be an interval of two months between every two calls.

The 9th rule gave power to the board of directors to put a stop to and determine the said undertaking, or to abandon any part thereof, or to unite or amalgamate with any other undertaking, and to make such rules and regulations for carrying out the purposes of the agreement as they should deem necessary and expedient; all which rules and regulations were to be binding upon the several parties thereto. And it also provided for the voting at public meetings.

The petition then stated, that several persons, to a considerable number, applied for and took shares in the Company, and a large number of such persons duly paid the deposits in respect of the shares allotted to them, and duly executed the parliamentary contracts and subscribers' agreement; and a considerable sum of money arising from the said deposits came into the hands of, or under the control of, the managing committee of the said Company.

That, by the Standing Orders of the Houses of Parlia-

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ment, certain plans, sections, and drawings of any intended railway were required to be deposited at various public offices; and three-fourth parts of the capital of such railway was required to be subscribed for, and a certain per centage on the said capital was required to be deposited with the Accountant-general of the Court some time prior to the introduction into the said Houses of Parliament of any petition for a bill for making such railway.

That, instead of complying with the Standing Orders of the said Houses of Parliament, with regard to the said undertaking, and applying to Parliament for an act to authorise the said undertaking, the said managing committee entered into some agreement, without the consent of the other shareholders, which was never carried into effect, for amalgamation or otherwise with a certain rival scheme or undertaking, which was projected and advertised for making a railway from London to Manchester, in a line alleged to have been laid out and adopted by one Mr. Rastrick, an engineer, which last-mentioned undertaking assumed the name of the Direct London and Manchester Railway (Rastrick's Line); and in consequence thereof, and of various other circumstances, and in fact, the said London and Manchester Direct Independent Railway Company (Remington's Line) had become wholly abortive, and the said undertaking had, in fact, been abandoned as wholly useless and unprofitable; and it had become wholly impossible to carry on the same; and it had wholly ceased to carry on any business whatever.

That, by means of the deposits paid upon the shares in the Company, considerable sums of money had been received by the managing committee, or paid into the bankers of the Company, and no account thereof had ever been rendered; and that a considerable sum still remained to be applied in meeting the outstanding liabilities of the Company; and that, if the same were insufficient for that

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purpose, the contributors and members of the said Company ought to pay and make up the same rateably, according to their respective shares; that there were outstanding liabilities of the Company to a large amount; and that the petitioner and the members of the Company were liable to be called upon and sued by the creditors of the Company, for and in respect of such outstanding liabilities.

That, in consequence of the said London and Manchester Direct Independent Railway Company (Remington's Line) having become abortive and abandoned, that Company had long since ceased to have, and had not, any office or place of business, and had not any officer or servant of or belonging to the Company; but that J. B. and M. T. B., two of the members of the Company, were two of the managing or acting committee of the Company, and had been served by the petitioner with the petition.

That a large number of the members and contributories of the Company were desirous that it should be dissolved, and the affairs wound up; but that the said J. B. and M. T. B., together with others of the managing committee, and some of the shareholders of the Company acting in collusion with them, were desirous of preventing the dissolution and winding up of the affairs of the Company, with a view to prevent the state of the accounts and affairs of the Company from being taken and ascertained, and for the purpose of promoting their own private ends and advancement, by dealing with the shares of the Company, although the same had become abortive; that, under such circumstances, the said Company could not be dissolved, or the affairs thereof wound up, without the aid and direction of the Court; and the petition prayed, that the said London and Manchester Direct Independent Railway Company (Remington's Line) might be absolutely dissolved and wound up, by and un-

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der the order and direction of the Court; and that it might be referred to one of the Masters to wind up the said Company according to the provisions of the said Act called the "Joint-stock Companies Winding-up Act, 1848," or, that it might be referred to the Master to make such preliminary inquiries as to the propriety and necessity or expediency of dissolving and winding up the said Company, as to the Court should seem meet; and that, when the said Master should have made his report upon such preliminary reference, then that such further order might be made as should be just, and that the costs of, and incident to, and consequent upon the application, might be ordered to be paid, in such manner as his Lordship might think fit.

Mr. *Bacon* and Mr. *J. H. Palmer* appeared in support of the petition.

Mr. *Russell*, Mr. *W. T. S. Daniel*, and Mr. *Stevens*, appeared for the respondent J. B.

Mr. *Law*, for the respondent M. T. B.

Mr. *Bacon* having replied—

The VICE-CHANCELLOR.—The act of 1848 is a very special law introducing a course of proceeding entirely new. No judge ought, in my opinion, to put the law in force in a case to which the Legislature has not plainly and distinctly said it should apply. In my opinion, it has not done so in the present instance, and I decline attributing to the Legislature the intention of including such associations as those in question under the terms which alone it has thought fit to use.

The term, by which such an association as the present

is designated, is a common one and well known, but that term has not been used.

Petition dismissed, without costs.

The petition was then presented, by way of appeal, to the *Lord Chancellor.*

Mr. *Bacon* and Mr. *J. H. Palmer,* in support of the petition, contended that a railway company was clearly a company coming within the definition of the 7 & 8 Vict. c. 111. It was "a commercial or trading company to be incorporated by charter or act of Parliament, or it was a company or body of persons associated together for commercial or trading purposes. The whole object of the Company, as shewn by the subscribers' agreement, was for trading in the conveyance of passengers and goods; that the 86th section of the General Act, 8 & 9 Vict. c. 20, which was always incorporated in all railway acts, rendered such companies carriers, and carriers were clearly traders, within the bankrupt laws; that it had never been disputed that railway companies came within the Registration Act; and this Company having, by the fact of provisional registration, been admitted within the provisions of that act, it was included expressly in the Winding-up Act of the same year, and then by special reference in the Winding-up Act of 1848. The case of *Ex parte Morrison* (*a*) shews that no doubts were entertained by the Commissioners as to a railway company coming within the original Winding-up Act of the 7 & 8 Vict. c. 111.

Mr. *Russell,* Mr. *Rolt,* Mr. *W. T. S. Daniel,* and Mr. *Stevens,* for the respondents.

It has been contended, that a railway company is necessarily a trading company; but this Company is not a railway company in the common acceptation of the term, but

(*a*) Ante, p. 224.

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a Company provisionally registered for the sole object of obtaining an act of Parliament, whereby they may be enabled to construct a line of railway. Nor is such a Company bound, if they obtain an act, to use the railway for the purpose of conveyance of passengers or goods: they may amalgamate with any other Company, or lease their line, or sell it altogether to any other Company. There is a difference between the Company trading for its own purposes and hiring or letting for the purposes of traffic to any other Company. Ship-owners are not within the bankrupt laws; and it is admitted by the argument on the other side, that the proper use of the railway by the Company, for the conveyance of passengers and goods, is necessarily to bring it within the act; therefore, so long as a possibility exists of its not being so used—while the directors have the power of making it a trading or a non-trading company, it cannot come within the provisions of this act. Again, the expression of one class of railway companies must, in this case, be considered as the exclusion of any other; if the first words of the section included *all* railway companies, what need would there be to amplify the words of the act by the expression of particular cases? It is hardly a rational conclusion to arrive at, that, under one act of the Legislature (9 & 10 Vict. c. 28), bankruptcy is to be the sole test of whether a railway company is or is not within its provisions; and, in another act of similar import, all railway companies, without exception, are declared to be included. Why was not the former act repealed by the latter, if the latter in effect did away with all its provisions?

Mr. *Bacon*, in reply.—The 1st section of the 7 & 8 Vict. c. 111, particularly alludes to companies "registered either provisionally or completely." It is admitted, that the Company has not yet commenced to trade, and the section referred to removes the necessity of proof of actual trading. The 23rd section of the Registration Act particularly pro-

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vides, that companies provisionally registered shall only do such acts as are necessary for constituting the Company, but shall not purchase, contract for, or hold lands, or execute any works. The object of the Company must be taken to be that which it sets forth in the subscribers' agreement. It must be considered a commercial Company for trading purposes: *M'Kay* v. *Rutherford* (*a*). The 5th section of the act of 1848 makes it lawful for any person who shall be, or claim to be, a contributory of the Company to petition for the dissolution and winding up of the affairs of the Company in the following cases:—"If any Company shall have been dissolved, or shall have ceased to carry on business, or shall be carrying on business only for the purpose of winding up its affairs, and the same shall not be completely wound up; or if any other matter or thing shall be shewn, which, in the opinion of the Court, shall render it just and equitable that the Company should be dissolved;" clearly shewing that the case of trading is not the only one contemplated by the act. The object of the reference in the act of 1848 to the particular class of Companies included in the act of 1846 is to remove any doubts as to whether the last act shall apply to such Companies. It is more reasonable to suppose that such mention was intended to have a cumulative than an exclusive effect.

April 18*th*.

LORD CHANCELLOR.—I have looked through the several acts of Parliament which bear upon this case, and the question which I have now to decide is, whether this Company is within the meaning of the Winding-up Act, as being an association for the purpose of obtaining an act of Parliament to enable them to make and construct a railway. The chief ground which was relied upon to shew that this was not within the Winding-up Act was, that

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it was not a commercial or trading Company; that it was merely to be looked upon as a contract to make a railway; that it was like a contract for the building of a house; and that it was not necessarily a commercial undertaking.

The affidavit in support of this application, which is not met by any affidavit on the other side, states, that, in or about the year 1845, the Company was projected for making a railway between London and Manchester for the carriage of passengers and goods. Then it was said, that, supposing the railway was completed, it did not follow that the Company would use it themselves as carriers; they might allow other persons to become carriers by carrying goods or passengers in their own carriages. I do not think this would make any difference. The professed object of the Company was to make a railway for the purpose of carrying passengers and goods for a profit; but whether that profit was to be derived by acting as carriers upon their line, or by allowing other persons to act as carriers, does not, I think, make any difference. The question, then, is, whether that description or announcement of their objects brings them within the provisions of the Winding-up Act. That act, after reciting the 7 & 8 Vict. c. 111, the 8 & 9 Vict. c. 98, and the 9 & 10 Vict. c. 28, says, "that this act shall apply to all companies, corporate or incorporate, within the provisions of either of the two acts first hereinbefore mentioned, (including all companies existing on the 1st day of November, 1844)" —that was the date of the commencement of the 7 & 8 Vict. referred to, and was anterior to the commencement of the present Company, which was not formed until the year 1845—"(and which shall have obtained, or shall obtain, a certificate of registration under the 7 & 8 Vict. c. 110); and to all compaies which would have been within the provisions of either of the said two acts, if they had not been dissolved, or had not ceased to trade at the time of the passing thereof respectively;" "and to all com-

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panies which, under the provisions of the said act to facilitate the dissolution of certain railway companies, shall, before the 1st day of March, 1848, have become bankrupt; and to all companies, associations, and partnerships to be formed after the passing of this act, whereof the capital or the profits is or are divided, or to be divided, into shares, and such shares transferable without the express consent of all the copartners."

It is clear that this Company would come within the Winding-up Act, if it had been formed after the passing of that act, though it might not be included in the first part of the section; and, if it be included in the first part of the section, it must be by force of that reference to the 7 & 8 Vict. c. 111. That statute describes the companies to which it relates in this way—"any commercial or trading company now or at any time hereafter incorporated by charter or act of Parliament, or any company or body of persons now or at any time hereafter associated together for any commercial or trading purposes, and registered either provisionally or completely," &c. The words there are, "commercial or trading purposes." In the Registration Act (7 & 8 Vict. c. 110), the words are, "for any commercial purpose, or for any purpose of profit," &c. Why these expressions are departed from in cap. 111, I have not been able to discover; but I do not think there is any essential difference, for whether the terms be "for commercial or trading purposes," or "for any commercial purpose, or for any purpose of profit," there is no doubt such an association is an adventure for the purpose of making profit.

The question therefore is, whether an association, or body of persons associated together, for the purpose of making a railway for the purpose of carrying passengers or goods, is or is not within the meaning of the 7 & 8 Vict. c. 111, as a body of persons associated together for any commercial or trading purposes. Now, "trading," under the

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bankrupt law, has obtained a judicial meaning; it is commercial in a large sense; but whether the definition of the word "commercial," which was adopted by the Judicial Committee, in the case of *M'Kay* v. *Rutherford* (*a*), or any other definition, might be more properly adopted, it is unnecessary to determine; for it appears to me, that the manufacture of goods, whether for the purpose of deriving profit by the sale of them, or from the use of them, is equally a commercial speculation. Here is an association formed for the purpose of making a railway, of manufacturing engines, &c., for the purpose of deriving profit one way or the other, either by using them for the purpose of carrying goods and passengers for a profit, or for the purpose of letting them to others for that purpose; but in either case it is a speculation, having profit for its object. The term "commercial" has received a judicial definition in the case of *M'Kay* v. *Rutherford;* but, irrespective of that case, I have no doubt whatever that the manufacture of a railway, for the purposes I have mentioned, is a commercial speculation within the terms of the 7 & 8 Vict. c. 111; and, therefore, I am of opinion, that this is a proper case for the order to be made for winding up the affairs of the Company.

Order absolute, as prayed.

April 25th. Mr. *J. H. Palmer* mentioned this matter again, for the purpose of fixing the date from which the order absolute was to take effect; and submitted, that it should be from the date of Vice-Chancellor *Knight Bruce's* order dismissing the petition, as his Lordship had decided that his Honor should have made the order absolute.

The LORD CHANCELLOR said, that, unless there was something in the act of Parliament to the contrary, he was of

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opinion that the order should bear date the day of his Lordship's order; but that the matter had better be mentioned in Mr. *Daniel's* presence.

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April 27th.

The case was again mentioned, when Mr. *J. H. Palmer* stated, that both parties had agreed that the order should bear date the day of his Lordship's order.

Mr. *Daniel*, at the same time, applied to have the proceedings under that order suspended, on the ground that an appeal to the House of Lords from his Lordship's order had been lodged.

His Lordship refused the application.

BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

Ex parte POCOCK, *Re* DIRECT LONDON AND MANCHESTER RAILWAY COMPANY (RASTRICK'S LINE).

May 25th.

(*Winding-up Act*, 1848.)

THE petition in this case was presented by T. Pocock, the allottee of thirty shares in the above-named undertaking, in respect of which he had paid five guineas per share deposit, praying the dissolution and winding up of the Company. It appeared that the undertaking had been for some time abandoned and had ceased to carry on business, and in August, 1846, the directors repaid to the shareholders 3*l.* 10*s.* per share of the amount of their deposits. The petitioner received the amount returned in respect of his thirty shares, and at the same time a memorandum was handed over to him to the following effect:—

In applications for the dissolution and winding up the affairs of a Company, the Court will take into consideration the particular circumstances of each case; and if the Court, from the materials before it, think it not expedient or proper that a Company should be wound up, it is its duty to act upon that impression.

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"It being deemed best to wind up the affairs of this Company, and the provisional directors having settled such affairs so far as to enable them to pay back immediately 3*l.* 10*s.* upon every share issued, I concur therein and consent to receive upon my shares, hereunder described, 3*l.* 10*s.* per share, and such other pro rata division of the funds which shall remain after the settlement of all claims and liabilities on the Company or the provisional directors, in satisfaction and discharge of such shares."

The petition stated, that a further division of 10*s.* per share was made in the year 1848, to such of the shareholders as were willing to sign a release; but the petitioner refused to accept the sum so offered, and did not sign the release; that no accounts of the receipts and payments of the Company had been rendered, and that there were many outstanding liabilities of the Company, for which the petitioner was liable.

That the directors had entered into some contract for the purchase of land for a station, and had improperly expended a sum of 15,000*l.* for that purpose.

Mr. *Bacon* and Mr. *J. H. Palmer*, in support of the petition, submitted, that the petitioner was merely, by the present petition, adopting a method of settling the affairs of the Company, which would free him from all future liabilities, and of which it was competent for any one shareholder to avail himself, even though every other shareholder be opposed to it.

Mr. *Rolt* and Mr. *Malins*, with whom were Mr. *Hoggins* and Mr. *Glasse*, opposed the petition, contending, that the petitioner, by his acceptance of the 3*l.* 10*s.* per share, and signing the memorandum, had so far acquiesced in the course of settlement then being carried on by the directors, that he had precluded himself from in any manner interfering with it, or proposing any other mode of settlement;

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that he had received the amount payable to him in August, 1846, and, although the present act passed in 1848, he had lain by and acquiesced in the arrangement made by the directors until the present time; that this was a case in which the Court was called upon to exercise a discretion given to it by the 12th section of the act, and was not bound to direct a reference, and that, under the circumstances of this case, the whole interest of the petitioner being so small, the Court would act within the spirit of the enactment if it refused the present application.

In answer to a question from the *Vice-Chancellor*, it was stated that there were no demands against the Company, and that the directors were willing to indemnify the petitioner from all liabilities.

Mr. *Bacon* replied.

The VICE-CHANCELLOR.—The small amount of pecuniary interest of the petitioner, although not conclusive, is, considering the evidence of the extent of the liabilities of the Company, not unworthy of consideration. Another circumstance to be considered, though not conclusive, is the length of time which elapsed between the passing of the act and the presentation of the petition. The 12th section of the act enables the Court to refer it to the Master to make preliminary inquiries as to the expediency or necessity of winding up a Company; and the 14th section enables the Court to dismiss the petition presented, to confirm the Master's report, or to make an order absolute. Although the Court has authority to make a reference if it consider it expedient or necessary, it is not bound to do so; and I apprehend, that if the Court, from the materials before it, think it not expedient or proper that the Company should be wound up, it is its duty to act upon that impression. Considering the various transactions which took place before the act passed, I think it quite clear that

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the utmost extent to which the Court can go to assist the petitioner on the present occasion is to refer it to the Master to inquire whether it would be proper that the affairs of this Company should be wound up; but I am not of opinion that I ought at present to go so far, and for this simple reason, that the accounts have not been furnished to the petitioner.

If the accounts had been produced, and there had been nothing unreasonable or plainly improper appearing on the face of those accounts, I should have dismissed the petition upon the respondents undertaking to indemnify the petitioner from the demands made against the Company, which have been stated as amounting to 2000*l.* or 3000*l.*, and paying him, if he would accept it, the 10*s.* per share in respect of his shares. I consider the Company bound to give such an undertaking.

Mr. *Malins*, on behalf of the Company, said that they were willing to give the required undertaking; whereupon—

The VICE-CHANCELLOR directed the accounts to be produced to the petitioner, and that he should have an opportunity of examining them, and of bringing any matter relating to them, if he thought proper, before the Court; the petition to stand over for that purpose, with liberty to either party to apply. The *Vice-Chancellor* then observed, that, if he remained of his then opinion, there must be something very strong, and plainly material, to induce him, under the special circumstances of this case, to make an order upon the petition.

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BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

Re RUGBY, WARWICK, AND WORCESTER RAILWAY COMPANY. *May 26th.*

(*Winding-up Act*, 1848).

A holder of scrip certificates in a Railway Company held to be a contributory within the meaning of the act.

TWO petitions were presented in this case, for the common object of dissolving and winding up the affairs of the above-named Company.

Mr. *Russell* and Mr. *J. H. Palmer* appeared in support of the petition presented by Mr. C., a holder of scrip certificates of shares, but who had not subscribed the Company's deeds.

Mr. *Malins* and Mr. *Terrell*, for the directors, opposed the petition, on the ground that a scrip holder was not a contributory within the meaning of the act; that a Court of equity had recognised this distinction; and that a scrip holder was not, until he executed the Company's deeds, in any manner liable in respect of the dealings of the directors.

Mr. *Roxburgh*, who appeared in support of a petition presented by A. and B., whose petition was unopposed, submitted, that the order should be made on their petition, which would obviate the difficulty arising from the objection to the title of the other petitioner.

The VICE-CHANCELLOR was, however, of opinion, that he was bound to make the order on Mr. C.'s petition, unless, by arrangement, it was agreed that orders should be made on both petitions.

The parties having agreed, the order was made accordingly.

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June 22nd. *Ex parte* MURRELL, *Re* THE LONDON AND SOUTH ESSEX RAILWAY COMPANY.

(*Winding-up Act*, 1848).

An allottee of twenty shares in a projected Company, which was afterwards abandoned, received back a first instalment of 1*l.* 10*s.* per share in respect of his deposit of 2*l.* 15*s.* per share, and thereupon delivered up his scrip, and gave an undertaking to give such further receipt or discharge as might be required by the directors. He afterwards received a final dividend of 3*s.* 3*d.* per share. It did not appear that there were any debts, or liabilities, or any assets of the Company in the hands of the directors, although it was charged by the petition, that some of the directors had not paid up their deposits. The Court, under these circumstances, refused to make an order under the above act.

THE petition in this case, (which was in the usual form), for the dissolution and winding up of the Company, also stated that the petitioner was the holder of twenty shares, on which he paid a deposit of 2*l.* 15*s.* per share; that divers persons agreed in writing to take, and had had shares allotted to them, but they refused or neglected to pay the deposits on them; by means whereof the liability of the petitioner and other persons who took shares and paid their deposit thereon, for contribution to the expenses properly incurred in the said undertaking, was considerably increased; and that no sufficient means exist, except under the powers conferred by the Joint-stock Companies Winding-up Act, to compel a due contribution from such of the contributories as have not paid.

That the petitioner became, and then was, a member and a contributory of the Company, within the intent and meaning of the act, and entitled to a share of the assets of the Company.

That the Company, or the directors thereof, did not proceed in their proposed application to Parliament for a bill for the purpose of authorising the construction of the railway, nor had any such application been made; that the petitioner, by himself and his solicitor, in the year 1846, made repeated applications to the secretary of the Company for an inspection of the accounts of the Company,

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and for an account of the application of the deposits, but the petitioner was, and had hitherto been, unable to obtain any account whatever of the disposal or appropriation of the deposits so paid by the petitioner and the other contributories to the Company or undertaking.

That, in or about July, 1846, the petitioner received a letter from the secretary, stating "that the sum of 1*l.* 10*s.* per share, in respect of the balance of deposits received, is now in course of payment at this office, between the hours of eleven and four daily; and that, as soon as the few outstanding accounts can be got in and adjusted, the remaining balance will be rateably divided amongst the scripholders. Scrip must be sent to me for examination three clear days previously to payment, accompanied by a letter in the form inclosed, in exchange for which a receipt will be given, with an undertaking on the part of the Company to pay the amount above mentioned, and such further sum as may, upon the final settlement of accounts, be divisible in respect of the scrip so given up."

That the Company had not been dissolved, but had ceased to carry on business, and the secretary and clerks had been discharged, and the place of business of the Company abandoned, although the affairs of the same had not been fully wound up; that various questions would arise on the winding up of the affairs of the Company, which could only be settled under the provisions of the act; and that the petitioner was desirous that the Company might be wound up under the act; and the petition prayed an order to that effect.

The affidavit of the petitioner, in support of the petition, stated, in addition to the facts set out in the petition, that in the month of April, 1846, the petitioner wrote to the secretary of the Company, requiring to be informed the amount then subscribed, the number of shares applied for, and the number allotted, the amount of the expenses the committee had already incurred, whether the commit-

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tee had allotments made to them, and whether they took up and paid for all such allotments; that, in reply to such letter, the secretary wrote to the petitioner a letter, stating that the provisional directors could not give the information required previously to the general meeting of the scripholders, which had been convened for the 7th May; that the petitioner attended the meeting of the 7th May, and inquired of the chairman the reason why the whole of the shares in the Company had not been allotted; but the chairman declined to answer such inquiry; that, on the 16th June, 1846, the petitioner again wrote to the secretary of the Company, stating that he perceived, by an advertisement in the paper, that the Company had been dissolved, and requiring to know whether it was the intention of the committee to return the deposit in full that had been paid, (2*l.* 15*s.* per share); if not, that he should instruct his solicitor to proceed for the recovery thereof; that the secretary, in reply, wrote that he was desired by the directors to say, that they considered a sufficient answer would be given to the petitioner's letter by referring him to the terms of the advertisement issued by the Company; that the petitioner shortly afterwards received from the secretary the circular letter set out in the petition.

The affidavit of the petitioner's solicitor stated, that, on the 23rd June, 1846, by the instructions of the petitioner, he wrote and sent a letter to the secretary of the Company, requesting that, if any deduction should be claimed on account of expenses, he might be informed when and where he could inspect the documents relating to the undertaking, particularly those which shewed the receipts and expenditure, as well as the allotment of shares; that he received from the solicitors of the Company an answer referring him to the advertisement in the public journals, announcing that 30*s.* per share, on account of the balance of deposits received, was in the course of payment; that, in reply to another letter written to the solicitors of the Company, they stated they would give the deponent any

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information he required; that, in consequence thereof, he called at the office of the said solicitors, and made inquiries as to the number of shares allotted, and, on behalf of the petitioner, required a return of the deposit paid up, after deducting a fair proportion of the expenses properly incurred on the whole of the shares allotted in the Company; but the solicitors declined to make or advise a return of the deposit on that footing, inasmuch as some of the persons to whom shares had been allotted had not paid the deposits on such shares.

Among the affidavits filed in opposition to the petition was one of Mr. C. R. T., solicitor to the Company, who swore that a bill for incorporating the Company was introduced into the House of Commons in the session of 1846, and was referred to a committee, who, after hearing evidence, decided that the preamble was not proved; whereupon the promoters proceeded to wind up the affairs and return to the shareholders the surplus of deposits paid by them, after deducting the debts and expenses incurred in and about the bill and the application to Parliament; that Murrell, the petitioner, received 30*l.* in part return of his deposits, being at the rate of 30*s.* per share, and thereupon he signed and gave to the secretary a letter or memorandum as follows:—

"London and South Essex Railway Company,
November, 1846.

"I acknowledge that I have surrendered to the provisional directors scrip (or bankers' receipt) for twenty shares in this Company, numbered 1211 to 1230, in exchange for the first instalment in respect thereof; and I hereby undertake to give such further receipt or discharge as may be required by the said directors.

(Name) "HENRY MURRELL,
(Address) 41, Threadneedle-street.

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That, on or about the 1st February, 1847, the petitioner was paid the sum of 3*l.* 5*s.*, as and for the second and final instalment of 3*s.* 3*d.* upon each and every of his said shares.

In another affidavit the same gentleman swore, that, on the 29th October, 1846, he produced an account to Murrell, who, after reading and considering the same, expressed himself satisfied therewith, and stated to deponent that he should send his scrip to the secretary, and should accept the amount proposed to be returned as the balance due to him in respect of such deposits. The account so rendered stated, that the amount received on deposits of 2*l.* 15*s.* and interest was 34,517*l.* 9*s.* 10*d.*, and payments to the amount of 31,705*l.* 5*s.* 6*d.*, among which was an item thus:—"Commisssion to bankers and brokers, miscellaneous office expenses," &c., 1283*l.* 18*s.*, and leaving a balance of 2812*l.* 4*s.* 5*d.*

The petitioner filed an affidavit in reply to Mr. C. R. T.'s, denying that he had ever seen any account, and stating, that, at the meeting of the 7th May, 1846, the chairman stated that the number of shares applied for was 64,756, and the number allotted was 14,587; and that, upon the petitioner inquiring of the chairman why the remaining 3413, out of the 18,000 into which the Company was divided, had been reserved, the chairman declined to answer the question; and that the petitioner believed that some of the directors had not paid the deposits on the shares which they allotted to each other.

Mr. *Malins* and Mr. *Roxburgh*, in support of the petition, contended, that the petitioner was clearly one of the class of persons to whom the Legislature intended by the new act to give a remedy, or at least the means of investigating the expenditure of his subscriptions; that, before the passing of the act, he was remediless, except by commencing a suit in equity; but it had been already proved that suits are perfectly hopeless against the managing

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body, and cannot be worked out; that the benefit held out by the new act, while it gave the same remedy as a successful suit, was attainable and inexpensive, and it was open to every person who could have maintained a suit in equity. That the petitioner's application was made on three grounds—first, because the Company, never having been legally dissolved, the directors had the power, at any time, of reviving the project, and calling on the subscribers to contribute; secondly, that they had given no reason why the full number of shares had not been allotted, nor any account of the sums received by way of deposit, nor of the disposal of the shares; and that, if the whole of the shares had been allotted and the deposits paid, there would have been 15,000*l.* more, on which the expenses lawfully incurred would have fallen rateably; and, thirdly, that, if the order were made on the present petition, those allottees of shares who had accepted shares but not paid their deposits, would be called on to contribute, which they were equitably bound to do; that, although the present application was made by a holder of scrip to a small amount, the benefit of it would be extended to a large class, and the Court would not, on account of the limited nature of the petitioner's demand, refuse him its assistance, any more than it would, in the case of a bill filed, refuse a creditor, suing on behalf of himself and others, the benefit of a decree, because his debt was small; that, in this case, the acceptance back of a portion of his deposit, ought not to prejudice the petitioner, even if he were fixed with a knowledge at that time of the acts of misfeasance charged against the managing committee; for the very interference of the Legislature shewed that it was absolutely necessary to give contributories, by legal enactment, a more ready and attainable remedy than a Court of equity held out to them; and the petitioner might well be excused for at one time declining an uncertain remedy, and at another of availing himself of the present easy and inexpensive pro-

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cess to attain his rights; that the Company had, by the very terms of their agreement, reserved to the petitioner the right of having a final settlement of their accounts; for they had agreed to pay "such further sum as might, on the final settlement of the accounts, be divisible in respect of the scrip so given up;" that no final settlement of accounts had, in fact, taken place, for, although the committee had paid a final dividend of 3*s.* 3*d.*, they had given no statement of the accounts, nor had they answered the charge in the petition, that some of the directors had not paid any deposits on the shares allotted to them.

Mr. *Lloyd* and Mr. *Bigg* opposed the prayer of the petitioner, on behalf of some of the directors.

THE VICE-CHANCELLOR.—This Company, whether formally dissolved or not, is substantially at an end, and has for years been so. There are no outstanding liabilities, as I understand, and no assets, except such as may be obtained by the directors from contributions of deposits from the shareholders who have not yet paid or contributed in respect of their shares. And I must view this petition as the petition of Mr. Murrell only, whose object (if it is viewed in that light) must be considered to be to recover for himself a sum of 22*l.*, which is all he has not received of his deposits. Now, this is asked in a case in which, in the year 1847, he received a second dividend by way of return of the amount deposited by him. He received it under the name and description of a final dividend. It is not proved, that, since that time, he has discovered any fact of which he had not notice before. I think he received 3*s.* 3*d.* on each share in 1847, with sufficient notice of all the materials which he now knows. I decline having anything to do with, or allowing the Court to be made subservient to, such a purpose as this, and I must decline acting on this petition. I make no order as to costs.

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BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

Ex parte ——, *Re* The WARWICK AND WORCESTER RAILWAY COMPANY. *May 26th.*

(*Winding-up Act*, 1848).

A resolution to dissolve a projected company had duly passed, under 9 & 10 Vict. c. 28, and the affairs of the Company were in the Master's office, under an order made in a suit instituted for winding them up. A petition was presented by a contributory of the Company, praying its dissolution, and that its affairs might be wound up, under the act of 1848.—The *Vice-Chancellor* made the usual order.

THIS was a petition presented for the purpose of winding up the affairs of the above-mentioned Company. An affidavit was filed in support of the petition, by which it was deposed, that the debts and liabilities of the concern amounted to more than 10,000*l*

Mr. *Malins* and Mr. *Roxburgh* appeared in support of the petition.

Mr. *Metcalfe*, for some of the directors, opposed it on the ground that the Company had been, in fact, dissolved by a resolution of the scripholders, called together under 9 & 10 Vict. c. 28; and that, at the time of the passing of the present act, no such Company as that named in the petition was, in fact, in existence; that the funds and assets of the Company were then in court, in a suit intitled *Goodman* v. *De Beauvoir;* and that an order of reference had been made to the Master to take an account of the debts and liabilities of the Company, and directing payment thereof, and the taxation and payment of the costs of the suit; that, where the winding up of the Company was so far completed under the direction and superintendence of the Court, the present application was wholly unncessary, and would only add to the costs; and that this was a case in which the Court might with great propriety exercise the discretion given to it by the 12th section of the act.

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Mr. *Glasse*, Mr. *Southgate*, and Mr. *Dunne*, also appeared for other parties, to oppose the present petition.

The VICE-CHANCELLOR.—I am of opinion that the Company is not prevented from being within the operation of the act of August, 1848, by reason of its dissolution having taken place between the dates of the two acts of Parliament. I am also of opinion that it is not necessary, in a case such as the present, in order to found the jurisdiction of the Court, to shew an insufficiency of available funds belonging to the association to meet its engagements. How it would be if the Company were not dissolved, and any persons requested or were desirous that it should continue, is quite a different consideration. Then the only difficulty is as to what has taken place in the suit, which led me to consider, for some time, whether it would not be right to send a reference to the Master to ascertain the necessity or expediency of winding up the affairs of the association under the act. I am of opinion, however, that it is not necessary to burden the parties with the expense of that inquiry; and I ought to make the order notwithstanding what has been done in the suit. If any parties find themselves inconvenienced from proceedings taken under the order in the suit and that on the petition, they will take such step as they may be advised. I consider it proper to make the common order, and the case will go to Master Senior, because he is the Master to whom the order of reference is made in the cause. The parties will consider for themselves whether this matter or the suit ought not to be stopped.

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BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

Re THE TRING, READING, AND BASINGSTOKE RAILWAY COMPANY. *June 20th.*

(*Winding-up Act*, 1848).

Where a Company have no office, an affidavit of service of the petition upon a member of the Company must be produced.

A PETITION was presented, and the usual order made for the dissolution and winding up of the above-mentioned Company; but a difficulty arose in the Registrar's office, in drawing up the order, whether, under the 10th section of the act (*a*), an affidavit of service was or not necessary.

Mr. *Chandless* now applied for the opinion of the Court on this point.

It appeared that the Company had not any office, and the petition had been served upon a member, who appeared by counsel at the hearing.

(*a*) By the 10th section of the Winding-up Act, 1848, it is provided, that every petition for dissolution and winding up, or for winding up the affairs of any company under this act, shall be advertised once in the "London Gazette," and shall be served at the head or only office of the Company, upon any member, officer, or servant of the Company there; or, in case no such member, officer, or servant can be found there, then by being left at such office; or, in case no office of the Company can be found, then upon any member, officer, or servant of the Company. Provided always, that no such petition presented by the direction of the Court of Bankruptcy, nor any order thereon, shall require advertisement under this act; provided also, that, in case no office of the Company, nor any member, officer, or servant thereof can be found, the Court may proceed to hear and to make any order on any petition for dissolution and winding up, or for winding up, on production of the number of the "London Gazette" containing such advertisement (if any) as aforesaid, and without proof that such petition has been served in manner aforesaid.

1849. The VICE-CHANCELLOR was of opinion, that, as this was an order involving the interests of other parties, such an affidavit was necessary.

BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

July 13th. *Re* THE TRENT VALLEY AND CHESTER AND HOLYHEAD RAILWAY COMPANY.

(*Winding-up Act*, 1848).

Service of a petition on the solicitor of the Company not a good service under the 10th section.

IN this case, the petition for winding up the affairs of the above Company had been served upon the solicitor of the Company; and a difficulty was raised in the Registrar's office, as to whether this was a good service under the 10th section of the Winding-up Act, 1848.

Mr. *Glasse* submitted the point for the opinion of the Court.

The VICE-CHANCELLOR was of opinion, that the solicitor of the Company was neither a member, officer, nor servant, within the meaning of the act; and he considered that the petition had not been sufficiently served.

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BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

Ex parte HOLLINSWORTH, *Re* THE IPSWICH AND SOUTHAMPTON RAILWAY COMPANY. *June 29th.*

(*Winding-up Act*, 1848).

A petition was presented by two members of the provisional committee of a projected Company, praying the usual order for dissolution and winding up of their affairs. It appeared that all the contributions for which the general body of shareholders was liable had been paid and expended:—*Held*, that the provisional committee, in respect of their liabilities inter se, were entitled to the order prayed.

THE petition was presented in this case by two of the provisional committee of a railway company, which committee consisted of 130 members, praying the usual order for the dissolution and winding up of the Company.

The peculiar circumstance in this case was, that the general body of subscribers had, in the event of an act not being obtained, and the abandonment of the project, only rendered themselves liable to pay 2*s.* per share; the whole of which had been expended, and a subscription had been entered into by the members of the provisional committee to meet the debts and liabilities.

It also appeared, that the sum so subscribed was insufficient to meet the demands, and that an action had been brought against the petitioners, in which a verdict had been given against them for 214*l.*, which they had since paid, together with the costs.

Mr. *Hardy*, in support of the petition, contended, that, if the order were made as prayed, the present petitioners would be enabled to get a contribution from the other persons liable to pay.

Mr. *Bacon* and Mr. *Welford* opposed the petition for some of the other members of the committee, contending that the order could not have the effect of making the general body of shareholders contribute, which was the object and intention of the act, but would only have a par-

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ticular operation, by making the members of the provisional committee settle their accounts, which might as well be done by arrangement amongst themselves, without the intervention of the Master.

The VICE-CHANCELLOR.—I see no reason why the petitioners should not have a right as against others equally liable with themselves for contribution, in respect of the money they have paid in consequence of the verdict; and I see no reason why the order asked by the petition should not be made; and I make the same accordingly.

BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

July 18*th*.

Ex parte HALL, *Re* THE NORTH OF ENGLAND JOINT-STOCK BANKING COMPANY.

(*Winding-up Act*, 1848).

Although a party may not actually have had his name inserted on the register of a company as a shareholder, yet, if he has so acted, and his acts have been so far adopted, that it may be inferred that both parties have waived the observance of the necessary forms, he will be held to be a contributory within the meaning of the act; his liability will, however, be limited to the time when his legal right to be registered accrued.

THIS was a motion on behalf of J. Hall, seeking to reverse the decision of Master Farrer, to whom an order for winding up the above Company had been addressed, whereby he had included J. Hall in the list of contributories to the Company in respect of six shares, as trustee for E. Onterston; and the object of the present motion was to have his name struck out from that list. The Master's note of the facts, and of his judgment, is as follows:—

"E. Onterston was the widow of A. Onterston, who was a holder of six shares. She is his sole executrix and residuary legatee. Probate was produced after her husband's death: she employed J. Hall as a friend, to receive the

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dividends on these shares, and received them through him. Previous to the marriage of E. Onterston with R. Taylor, she assigned these shares and other property to J. Hall, upon trust to receive the income thereof, and pay the same to her separate use, with usual clauses against anticipation, &c. The marriage with Mr. Taylor took place in 1842. Notice of this assignment, and of J. Hall having been made the trustee of these shares, was given to the Bank soon after the marriage, and an entry thereof made in the Bank book; but there is no evidence to shew by whom the notice was given—it is an inference from the entry. The returns to the Registry Office are very irregular; and it was not until after the stoppage of the Bank that the name of J. Hall was retained as trustee of E. Onterston. It only came out in the progress of the case, that this lady had married R. Taylor. In the Company's books, and throughout the registry returns, she is called Onterston, wherever she is mentioned. It seems she never took the name of Taylor. The proceedings between Hall and the Bank are regardless of the forms of the trust-deed. The question is, whether, notwithstanding their irregularity, J. Hall is, as regards the Company, a member? It is necessary, first, to consider the relation in which E. Onterston, before the execution of the deed of trust, stood to the Company. She was executrix and residuary legatee, and received dividends by her agent for several years. If she had not married, and had continued to receive dividends, it would have been doubtful whether the official manager ought to include her in the list in her own right, or as executrix. (See the case of *Armstrong* before the *Lord Chancellor*, on appeal). According to Vice-Chancellor *Knight Bruce's* judgment (*a*), she could be included only as executrix, and I should consider that judgment as a rule. But, by her own act, prior to her marriage, she dealt with these shares, not only as executrix, but in her own right she assigned

(*a*) 1 De G. & S. 565.

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these shares as her own property to Hall, as trustee for her. If Hall and E. Onterston had complied with the deed of settlement, and he had been duly received into the Company as a trustee for her, there can be no doubt but that he must have been included in the list, because the terms are express, that the Company shall look only to the trustee, and not to the cestuis que trust. He has not complied with those terms; but has he not so acted as to entitle the official manager to say, 'You renounced or waived observance of the requisitions of the deed; the Company also renounced or waived them; you represented yourself as trustee of these shares; you claimed and received dividends as such trustee; we paid you dividends as such trustee; all objections which might arise from not adopting the machinery of the deed are removed by your and our conduct:' (*The Cheltenham and Great Western Railway Company* v. *Daniel*(*a*), in which is cited *Sheffield and Manchester Railway Company* v. *Woodcock*(*b*)). In the former case, Lord *Denman* says, 'I think the point is conclusively settled by *Sheffield and Manchester Railway Company* v. *Woodcock*. That case shews that all difficulties which may arise from not adopting the machinery of the act (the private act) are got over by the conduct of parties who claim to be placed in the situation of proprietors, and are so placed accordingly.' In this case, Hall's conduct is equivalent to a claim to be a proprietor. If Hall is not included in the list, no one else can be. It is clear that the husband, Taylor, cannot be; for the shares were not vested in E. Onterston when he married her. It is equally clear that she cannot be included. I reluctantly come to the conclusion that I must include J. Hall as trustee for E. Onterston. He is so described in the list.

"25*th April*, 1849." "J. W. F."

"Since I wrote the above opinion, it has occurred to

(*a*) Ante, Vol. 2, p. 728. (*b*) 7 M. & W. 574.

me that J. Hall is, in truth, trustee for E. Taylor, not Onterston. The objection to the notice has not been taken; perhaps he could not be heard to take it; as the official manager has adopted Hall's own representation of himself, with a full knowledge of the marriage, I must include Hall as trustee for E. Taylor. Since I wrote these notes, a further affidavit has been left by Hall. I have given him opportunity to observe upon it; but I conclude he does not wish to do so. The affidavit does not alter my view of the case.

"31*st May*, 1849." "J. W. F."

Mr. *Hallett* appeared in support of the motion, and contended, that Hall had never been accepted a shareholder by the Company, although he had admitted the acceptance of the trusts. That, although he had received the dividends, he had always been described in the warrants as agent for Onterston's executors, and had signed the warrants, sometimes "for the executors," at other times "for the trustees of Onterston," and sometimes "for Elizabeth Onterston;" and that his name did not, in fact, stand among the shareholders of the Bank.

The VICE-CHANCELLOR, (without hearing Mr. *Bacon* and Mr. *Headlam*, for the official manager.)—Several cases have occurred in which the formalities prescribed to be pursued in the transfer of shares have not been observed, but have been waived on both sides, and yet the parties were held to be contributories. This, I apprehend, is clearly one of those cases. I cannot strike Mr. Hall's name out of the list of contributories; but, if he wish me to limit the time within which he is liable to losses, I think he is entitled to a declaration, that he was only so liable from the 23rd March, 1842. As this, however, was not the object of his notice of motion, he must pay the costs of this application.

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BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

June 29th. *Re* THE OXFORD AND WORCESTER EXTENSION AND CHESTER JUNCTION RAILWAY, &c.

(*Winding-up Act*, 1848).

The Master made an order for delivery up of certain papers, deeds, &c., on which the solicitors of the Company claimed a lien for costs. Order of the Master discharged.

Held, that the words of the 28th and 66th sections are controlled by those of the 58th (a).

IN this case, the Master, to whom the order of reference for winding up the affairs of the above Company was

(a) Sect. 28. "That, immediately after the appointment of an official manager, the Master shall by order direct that all the books of accounts, deeds, instruments, cash, bills, notes, papers, and writings of and belonging to the company, shall, within a time to be limited in that behalf, be delivered up, and the same shall accordingly be delivered up, by every person in whose custody, possession, or power the same may be, to the official manager, and shall be kept by him; and from and immediately after the appointment of any new official manager, all the same matters shall be in like manner ordered to be, and shall be, accordingly delivered over to him: provided, nevertheless, that it shall be lawful for the Master from time to time, and at any time, to make such order as he shall think fit relative to the custody or deposit, either absolutely or only for a time, of such books of account, deeds, instruments, bills, notes, papers, and writings, or any of them."

Sect. 58. "That, except as is by this act expressly provided, nothing in this act contained, nor any petition or order under the same, for the dissolution and winding up, or for the winding up of any company, shall extend or enlarge, diminish, prejudice, or in anywise alter or affect the rights or remedies of creditors or other persons, not being contributories of the company, or the rights or remedies of creditors, or other persons, not being contributories of the company, or the rights or remedies of creditors being also contributories, but being creditors of the company, upon a distinct and independent account, whether against the company or against any of the contributories of the same; nor the rights or remedies of the company against any contributories or other persons; nor shall

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directed, made an order, directing K. P. and C. C. (the former solicitors of the Company) to deliver up to Mr. T., the official manager, all books of account, deeds, instruments, cash, bills, notes, papers, and writings, of or belonging to the Company, in their custody, possession, or power.

Mr. *Terrell*, on behalf of Messrs. K. P. and C. C., now moved to discharge the order of the Master.

The motion was supported by an affidavit of C. C., whereby he deposed that there was a clear balance due to the firm, of 190*l.* and upwards, for business done and money expended by them for the Company, upon their retainer. The case of *Ex parte Underwood* was cited (*a*).

Mr. *Logie* appeared for another solicitor of the Company.

Mr. *Cairns*, in support of the Master's order, although

alter or affect any contracts or engagements entered into by or with the company or any person acting on behalf of the same, previously to any such petition; nor any actions, suits, or other proceedings pending at the date of such petition."

Sect. 66. "That, after the appointment of the official manager of the company, the Master shall from time to time, by order to be made upon the application of the official manager, or of any contributory, order and require any contributory, trustee, receiver, banker, or agent, to pay, deliver, or transfer forthwith, or within such time as the Master shall direct, into the hands of the official manager, any sum or balance, books, papers, estate, or effects, which shall happen to be in his hands for the time being, and to which the company is primâ facie entitled, or which, in the case of a contributory, shall appear to the debit of his account, as contributory with the company, as entered in the books of the company, anything in the present practice of the courts of equity to the contrary notwithstanding: provided, nevertheless, that it shall be lawful for the person upon whom any such order shall be made, to apply to the Master to discharge or vary any such order, or to enlarge the time thereby fixed for such payment."

(*o*) 1 De G. B. C., 190.

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he did not dispute the fact of the debt, contended, that, if the present order were discharged, the whole machinery of the act would be stopped and rendered nugatory; that, without the books in question, the Master could not proceed one step. That the solicitors were only creditors of the Company in respect of their debt, and must come in with them for payment; but they had no right to call on the official manager to pay them off before the other creditors of the Company. The solicitors could have the papers returned to them when the official manager had ceased to require them.

The VICE-CHANCELLOR.—Your proposition is to use the papers for all the purposes of the winding-up, and then, when they are of no more value than waste paper, to return them. This would be like ordering a man to deliver up an orange without prejudice to his title to the rind. I can see nothing in this act of Parliament which shews the intention of the Legislature to commit so gross an act of injustice. If it had been so intended, it would have been expressed. The solicitors have not been discharged, nor have they discharged themselves. The official manager is professing to administer the affairs of a scheme defunct and insolvent; and he asks the solicitors to hand over to him the papers, to enable him to do so, promising to return them, when, for anything they may be worth, they may be burnt. So much of the order as directs the delivery up of these papers by the solicitors must be discharged.

It is proper to state, that the Master has not given any opinion, but has made this order with the view of having the question brought before the Court.

The motion eventually was allowed to stand over, to see whether the parties could agree as to the terms on which the books should be delivered up.

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July 10*th*.

On this day, the matter was again mentioned to the Court by Mr. *Cairns*, for the official manager, who stated, that an offer was now made by him to satisfy the lien out of the first monies that should come to his hands.

Mr. *Terrell*, for Messrs. K. P. and C. C., declined the offer.

The VICE-CHANCELLOR.—As the parties decline to accede to this offer, I am of opinion that the Court cannot compel the solicitors to deliver up these papers, &c. without subverting the law of the country. They are offered a contingency; if money is received, they are to be paid. If, on the other hand, no money is received, their bills will not be paid. The solicitors, and not the official manager, will have incurred the risk; and, as between the two, the person, in my opinion, to run the risk, is the official manager, and not the solicitors. The offer now made is, to destroy the solicitor's lien to return the papers, giving them a chance of payment. Let so much of the Master's order as requires the delivery up of the papers be discharged.

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BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

July 4th. *Re* THE LANCASTER AND NEWCASTLE-UPON-TYNE RAILWAY COMPANY.

(*Winding-up Act*, 1848).

The petitioner had agreed with other members of the Company to refer all matters in difference, and also the adjustment and settlement of the affairs of the Company, to arbitration. The arbitrator had made his award, but it had not been taken up:—*Held*, that the petitioner was not barred from obtaining an order for winding up the affairs of the Company under the act.

THE petition in this case was presented for the purpose of winding up the affairs of the above-named Company.

Mr. *Wood* and Mr. *Dickenson* in support of the petition.

Mr. *Winstanley*, on behalf of the registered solicitor of the Company, opposed it, contending, that the petitioner had precluded himself from proceeding under the act, by an agreement which had been entered into by himself and other members of the provisional committee, to refer all matters in difference between the parties, and also the adjustment and settlement of the affairs of the Company, to arbitration.

It appeared that the arbitrator had made his award, but it had not been taken up; and it was stated in the affidavit, filed in opposition to the motion, that the petitioner had neglected and declined to take up the said award, as he might have done.

The VICE-CHANCELLOR was of opinion, that, as it had not been distinctly sworn that all parties who might be or were contributories to this Company were parties to this agreement, and the terms of the agreement not being in evidence, to shew that the arbitrator had equal power with a Master in Chancery to compel the winding up of the affairs of the Company, his Honor made the usual order.

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COURT OF EXCHEQUER.

Hilary Term, 1849.

THE NEWRY AND ENNISKILLEN RAILWAY COMPANY *v.* COMBE. *Feb. 17th.*

To debt for calls against a shareholder, the defendant pleaded, that he became the holder of the shares by subscription, and that at the time of his subscribing for the shares, and of the making of the calls, he was an infant, and whilst he was an infant he disaffirmed the contract and subscription, of which the plaintiffs then had notice, and that he then gave notice to the plaintiffs that he held the shares at their disposal: —*Held*, a good defence to the action.

Semble, first, that the word subscriber in the Companies Clauses Consolidation Act means, those persons who during infancy

DEBT for calls.—The first count stated, that the defendant, at the respective times of the making of the respective calls hereinafter mentioned respectively, was and still is the holder of divers, to wit, fifteen shares, in the said Company, and at the time of the commencement of this suit was and still is indebted to the said Company in a large sum of money, to wit, 200*l.* in respect of two several calls, the first of the said calls being a call of a certain sum of money, to wit, the sum of 2*l.* upon each of the said shares, and the other of the said calls being a call of a certain other sum of money, to wit, the sum of 2*l.* 10*s.* upon each of the said shares theretofore respectively, to wit, on the 21st of February, 1846, and on the 8th of August, 1846, respectively, duly made by the said Company; whereby an action hath accrued to the said Company, by virtue of "The Companies Clauses Consolidation Act, 1845," and "The Newry and Enniskillen Act, 1846," &c.

Second count was on an account stated.

First plea to the first count—That, before the making of the said several calls in the said first count mentioned, to wit, on the 1st of December, 1845, he, the defendant, contracted with the said Company to take, and then subscribed for, the said shares in the said first count mentioned; and that he became and was then the holder of

are capable of contracting; and, secondly, that such a contract entered into may be disaffirmed by the infant before or after his attaining his full age.

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the said shares, by reason and in consequence of his having so contracted and subscribed for the said shares as aforesaid, and not otherwise; and that, at the time of his so contracting and subscribing for the said shares as aforesaid, and also at the respective times of the making of the said several calls in the declaration mentioned, he, the defendant, was an infant within the age of twenty-one years, to wit, of the age of twenty years; and that, after he, the defendant, had so contracted and subscribed for the said shares as aforesaid, and before the commencement of this suit, and whilst he was such infant as aforesaid, and within the age of twenty-one years, to wit, on the 7th of December, 1846, he, the defendant, disaffirmed and repudiated his said contract and subscription, of which said disaffirmance and repudiation the plaintiffs then had notice; and thereupon, and before the commencement of this suit, and whilst the defendant was such infant as aforesaid, and within the age of twenty-one years, to wit, &c., the defendant, at the request of the plaintiffs, gave notice to the plaintiffs, that he, the defendant, then held the said shares at their disposal. And the defendant further says, that he, the defendant, hath always, from the time of his giving the said last-mentioned notice, hitherto held the said shares at the disposal of the plaintiffs; of all which the plaintiffs have always hitherto had notice. Verification.

Third plea to the second count—That the defendant, at the time of the making of the said contract in the said last count mentioned, was an infant within the age of twenty-one years. Verification.

Replication.—As to the last count, the plaintiffs entered a nolle prosequi; and as to the first plea, they demurred specially, on the ground that it was not averred, nor did it appear by the said plea, that the defendant repudiated the said contract, or otherwise refused to continue in possession of the said shares after his attaining the age of twenty-

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one years; nor was it averred that the defendant was still under the age of twenty-one years; nor was any other good cause shewn, wherefore the defendant was not now liable for the said calls, in as full and ample a manner as if at the time of the making of the said contracts the defendant had attained the age of twenty-one years; and that it did not appear by the plea, but that the defendant might be the holder of the said shares as trustee or otherwise, so as to be liable, notwithstanding the defendant was, or still is, an infant.

Joinder in demurrer.

Petersdorff (with whom was *Rochfort Clark*), in support of the demurrer.—This is not a liability arising out of contract, but out of the provisions of acts of Parliament. The special act, 8 & 9 Vict. c. *cxxi*, incorporates in it the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16 (*a*).

(*a*) The following are the sections of 8 & 9 Vict. c. 16, bearing upon the present case, referred to on the argument:—

Sect. 3. The following words and expressions, both in this and the special act, shall have the several meanings hereby assigned to them, unless there be something in the subject or the context repugnant to such construction; (that is to say), the word "shareholder" shall mean shareholder, proprietor, or member of the company, &c.

Sect. 8 enacts, "that every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company."

Sect. 18 enacts, "that, if the interest in any share have become transmitted in consequence of the death or bankruptcy or insolvency of any shareholder, or in consequence of the marriage of a female shareholder, or by any other lawful means than by a transfer according to the provisions of this or the special act, such transmission shall be authenticated by a declaration in writing, as hereinafter mentioned, or in such other manner as the directors shall require; and every such declaration shall state the manner in which, and the party to whom, such share shall have been so transmitted, and shall be made and signed by some credible person before a Jus-

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The 3rd section defines "shareholder" to be "shareholder, proprietor, or member of the Company." Section 8 enacts,

tice, or before a Master or Master Extraordinary of the High Court of Chancery, and such declaration shall be left with the secretary, and thereupon he shall enter the name of the person entitled under such transmission in the register of shareholders; and for every such entry the company may demand any sum not exceeding the prescribed amount; and where no amount shall be prescribed, then not exceeding five shillings; and until such transmission has been so authenticated, no person claiming by virtue of any such transmission shall be entitled to receive any share of the profits of the undertaking, nor to vote in respect of any such share as the holder thereof."

Sect. 21. And with respect to the payment of subscriptions, and the means of enforcing the payment of calls, it is enacted as follows:—"The several persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the company, at such times and places as shall be appointed by the company; and with respect to the provisions herein or in the special act contained for enforcing the payment of calls, the word 'shareholder' shall extend to and include the legal personal representatives of such shareholder."

Sect. 22. "It shall be lawful for the company from time to time to make such calls of money upon the respective shareholders in respect of the amount of capital respectively subscribed or owing by them, as they shall think fit, provided that twenty-one days' notice at the least be given of each call, and that no call exceed the prescribed amount, if any, and that successive calls be not made at less than the prescribed interval, if any, and that the aggregate amount of calls made in any one year do not exceed the prescribed amount, if any; and every shareholder shall be liable to pay the amount of the calls so made in respect of the shares held by him, to the persons and at the times and places from time to time appointed by the company."

Sect. 25. "If at the time appointed by the company for the payment of any call, any shareholder fail to pay the amount of such call, it shall be lawful for the company to sue such shareholder for the amount thereof in any court of law or equity having competent jurisdiction, and to recover the same with lawful interest from the day on which such call was payable."

Sect. 26. "In any action or suit to be brought by the company against any shareholder to recover any money due for any call, it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to declare that the defendant is the holder of one share or

that *every person*, who shall have subscribed or be entitled to a share in the Company shall be a shareholder; section 21 empowers the Company to make calls; and the 22nd section enacts, that *every* shareholder shall be liable to pay the amount of the calls made in respect of the shares held by him. The enactments are positive; and from those sections, and the 79th, it is clearly the intention of the statute to make every shareholder, whether lunatic, infant, or

more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount in respect of one call or more upon one share or more (stating the number and amount of each of such calls); whereby an action hath accrued to the company, by virtue of this and the special act."

Sect. 27. "On the trial or hearing of such action or suit, it shall be sufficient to prove that the defendant, at the time of making such call, was a holder of one share or more in the undertaking; and that such call was in fact made, and such notice thereof given, as is directed by this or the special act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever; and thereupon the company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period."

Sect. 28. "The production of the register of shareholders shall be primâ facie evidence of such defendant being a shareholder, and of the number and amount of his shares."

Sect. 29. And with respect to the forfeiture of shares for non-payment of calls, it is enacted as follows: — "If any shareholder fail to pay any call payable by him, together with the interest, if any, that shall have accrued thereon, the directors at any time after the expiration of two months from the day appointed for payment of such call, may declare the share in respect of which such call was payable forfeited, and that whether the company have sued for the amount of such call or not."

Sect. 79. "If any shareholder be a lunatic or idiot, such lunatic or idiot may vote by his committee, and if any shareholder be a minor, he may vote by his guardian, or any one of his guardians; and every such vote may be given either in person or by proxy."

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otherwise, liable; the obligation arises out of the possession of shares; and the Legislature says, "If you claim the benefit of the shares, you must bear the burthens." The declaration is based on no agreement, and the only evidence at the trial would be the production of the register. [*Parke*, B.—This is a case of contract with the Company; and the question is, whether it is not, like all other contracts entered into by infants, voidable. When the statute speaks of persons subscribing, it means by binding contract; persons competent to subscribe. "Subscribing" means "contracting, agreeing" to pay for shares; and the question is, whether the Legislature did not mean to confine the case to binding contracts. What would be the effect of a feme covert subscribing?] She would be liable: *The Cork and Brandon Railway Company* v. *Cazenove* (*a*). If the case be one of contract, it is with the Legislature: Story on Contracts, sect. 73. And as an infant cannot ratify, he cannot repudiate, during infancy; if he could, he might repudiate, and then, on attaining his age, might again affirm a contract. Lord *Coke* (*b*) makes a difference between matters of record and matters in fait. "For matters in fait he shall avoid, either within age or at full age, as hath been said; but matters of record, as statutes merchants, and of staple, &c. must be avoided by him during his minority, and the like." However, he cannot disaffirm whilst he retains the subject-matter. There can be no partial disaffirmance. It is admitted by the plea, that he retains possession of the shares as trustee for the Company; then he must be liable as trustee for the calls. Consistently with this plea, the defendant may have attained his age, and have ratified the contract, if it be one: he appears by attorney, which shews that he is of age. It must be assumed that he is still on the register, which alone is sufficient to render him liable.

(*a*) 11 Jur. 802; 9 L. T. 313; 34 Leg. Obs. 464.

(*b*) Co. Litt. 380. b.

Peacock, contrà.—It never was the intention of the Legislature to alter the law as to the capacity of lunatics and infants. The meaning of the word "subscribers" is those who have subscribed according to law, that is, those who have entered into valid contracts. [*Parke*, B.—There may be some question as to the liability of those who are expressly named in the act (*a*).] Perhaps so; but the liability of infants generally was not intended to be altered by the act, for it speaks of "executors, &c. of shareholders;" and an infant or feme covert cannot appoint an executor: it must mean legal executor. The Legislature, no doubt, contemplates his becoming shareholder, but that must be by bequest, and not by his own act; and the 79th section of the Companies Clauses Consolidation Act shews that the Legislature considered that he had not sufficient discretion to vote, by enabling his guardian to exercise that power. [*Parke*, B.—Suppose an infant were to purchase shares and to repudiate them on his attaining his age, who would be liable for the calls?] The vendor, because it was his fault that he transferred by a voidable contract: *Holmes* v. *Blogg* (*b*); *Stikeman* v. *Dawson* (*c*); Com. Dig. "Infant," (C.) 2 and 9; Platt on Leases, 28, 528; Bac. Abr. tit. "Infant," (C.) 9; *Zouch* v. *Parsons* (*d*). [*Parke*, B., referred to *Kirton* v. *Elliott* (*e*).] An infant cannot recover back the deposit, and the Company's remedy is to forfeit the shares. The ordinary plea is merely that defendant was an infant; and if the defendant had affirmed the contract on his attaining his age, the plaintiffs ought to have replied that: Com. Dig. "Infant," (C.) 9; *Cohen* v. *Armstrong* (*f*); *Baylis* v. *Dineley* (*g*); Stephen on Pleading, 387.

Petersdorff, in reply.—The liability of the defendant is

(*a*) See *Scott* v. *Berkeley*, ante, p. 51.
(*b*) 8 Taunt. 35.
(*c*) 1 De G. & S. 90.
(*d*) 3 Burr. 1794.
(*e*) 2 Bulst. 69.
(*f*) 1 M. & S. 724.
(*g*) 3 Id. 477.

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not founded on contract, but under act of Parliament, and therefore the cases cited do not apply; besides, the defendant has not absolutely repudiated his claim to the shares which are now in his possession. [*Parke*, B.—The shares cannot be in his possession; a share is the right to an interest in the profits of the Company. What could the defendant do more than he has done, to get rid of his interest?] He ought to have returned the certificates. [*Rolfe*, B.—The defendant does not necessarily hold any corporeal thing. *Parke*, B.—We cannot infer from this plea, that there are any certificates.] Consistently with this plea, the defendant may be receiving the profits of the shares at the present time, and in that case would clearly be liable. [He also referred to Story on Contract, p. 51; *Bligh* v. *Brent* (*b*).]

PARKE, B.—I am opinion that the defendant is entitled to the judgment of the Court. The declaration alleges the defendant to be the holder of shares, and to be indebted to the plaintiffs in that character. The defendant pleads, amongst others, [his Lordship read the first plea]; to this there is a demurrer. The first ground on which it is said that the defendant is liable, is by reason of a duty which is cast upon him by act of Parliament, and not by reason of any contract. It is true, in one sense, that a duty is cast upon him by act of Parliament, but we must recollect that the act of Parliament is a private one; and though the public act, the 8 & 9 Vict. c. 16, is incorporated with it, that act was passed to be incorporated in all other acts of a like nature, and for the purpose of preventing length and repetition in the private acts, and is included in them, as the General Inclosure Act is in other cases. This case, therefore, is regulated by a private act, and no public duty is thrown upon the shareholders. The

(*b*) 2 Y & C. 268.

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act must be considered as passed for the purpose of carrying out a private agreement between the parties, and is only a legislative sanction of a private contract, putting the Company in the situation of a corporation; and though a duty is imposed by the act, it in no way restricts the contract that makes the parties shareholders, though it enables the Company to recover calls, and to declare, in a more concise manner than they would otherwise be enabled to do. The 8th section of the Companies Clauses Consolidation Act declares, that every person who shall have subscribed the prescribed capital or upwards to the capital of the Company, or shall otherwise have become entitled to a share in the Company, and whose name shall have been entered on the register of shareholders, shall be deemed a shareholder of the Company;" so that, in order to be a shareholder, he must have subscribed, and his name must have been on the register. In the first place, he must have subscribed, that is, he must have contracted to take shares; and that being so, the general rule is well stated in *Stowel* v. *Lord Zouche* (*a*), that generality of words must be restrained by a reasonable construction of them; and, applying this rule to the present case, I think that the word "subscriber" must be taken to apply to those persons, who are capable of contracting, and that it was not the intention of the Legislature to make liable those persons, who were incapable of contracting, such as infants, idiots, or feme coverts. But it is said, that the statute assumes that infants may be shareholders, by giving their guardians power to vote; no doubt it does, and they may be so by descent, marriage, and a hundred other ways, not by subscription; and, therefore, that does not alter the case. The question, then, is, whether, when he has entered into a contract like this with the Company, he may not afterwards disavow it; and I think that he may, as in other cases of contract, during

(*a*) Plowden, 364.

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infancy, or on coming of age. This is clearly laid down in Bac. Abr. tit. "Infancy," (I.) 5, and in Coke upon Littleton, 380; in matters in fait, he may disavow when he comes of age, or before; in this case therefore it was perfectly competent for him to repudiate the contract during infancy. Though there was some doubt as to the facts of the case of *The Cork and Brandon Railway Company* v. *Cazenove*, there is this distinction: in that case there was no disaffirmance of the contract, which there is here; if there had been an affirmance afterwards, as it is said that there might have been consistently with this plea, that ought to have been replied. Then it is asked, supposing he had enjoyed, before repudiation, as in the case in Bulstrode, what would have been the effect? That is immaterial to the present inquiry, because it does not appear that there has been any enjoyment before repudiation; and if the defendant would be responsible for calls, by reason of his having received the profits of the Company, that also ought to come from the other side. The plea of infancy and repudiation is primâ facie an answer to the plaintiff's claim.

It is said, that the defendant has not done all that he ought to have done in repudiating the contract; but I am at a loss to see what he could have done more. He disavowed, and gave notice to the Company that he did so, and that he held the shares at their disposal; and I think that that was all which he was called upon to do. He clearly is not liable, unless a subscriber and on the register; and if he still remains on the register, that is not his fault, but the Company's, who have the power of erasing his name. Upon the whole, I think that the defendant is entitled to the judgment of the Court. This case does not clash with that in the Queen's Bench. There was no repudiation there, but, on the contrary, the defendant, after attaining his full age, assented to and ratified the contract, and so, no doubt, was liable.

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ROLFE, B.—I am of the same opinion. The plea in effect says, that the defendant was not at the time of the commencement of the action a shareholder; and I think that he was not, because it states that when he became an original subscriber, that is, one of the parties who had contracted to furnish funds to work out the objects of the Company, he was an infant. The first question is, whether the Legislature intended to alter the liability of infants entering into such contracts with the Company. I think it could not. When it says all persons entering into contracts shall be liable, it means all persons that could contract should be liable. Could it be argued, that, because the 14th section says that every shareholder may sell and transfer his shares, that idiots and persons unable to contract might do so? It means, that all persons who are not incompetent to contract, may transfer; it is like the case cited from Plowden. When the act of Parliament for consolidating the criminal law says, that if any person shall obtain goods by false pretences, he shall be punished, does a child six years old become liable, because the Legislature says that all persons shall be liable? Certainly not: for a child of that age cannot commit a crime; therefore, this statute, when it says that every shareholder shall be liable, means every shareholder capable of entering into contracts. This plea says, that at the time of entering into the contract of subscription the defendant was an infant. I doubt whether the law as to enjoyment under leases would apply to this case; but suppose it did, the plea shews that the defendant has done all that he could to disaffirm the contract, and that his disaffirmance was absolute and complete. It is said that he ought to have returned the certificates, but it does not appear certain that he had any to give up; he states that he became a shareholder during infancy, and that during infancy he disaffirmed the contract, which he may do. Our decision in this case in no way clashes with the principle laid down in the Queen's Bench.

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PLATT, B.—The act of Parliament had two objects in view: first, to guard the interests of third parties; and secondly, the regulation of the parties inter se. That part of it which regulates the parties inter se, is the same as if all the clauses were thrown into the form of an agreement, the act operating as a legislative sanction to it; and if so, the incidents of agreements would apply. Now it is remarkable that those clauses of the act, which refer to infants and persons incapable of contracting, confer upon them some benefit; and it would seem to be an object of the Legislature to protect them, in giving those having the management of them the benefit of the shares; but there is no part of the act that takes from them the protection which the law ordinarily throws around them. The defendant, being an infant, repudiates the contract, and gives notice to the Company, which renders the contract void ab initio; that being so, the defendant is entitled to the judgment of the Court.

Feb. 19*th*.

THE LEEDS AND THIRSK RAILWAY COMPANY *v.* FEARNLEY.

It is no defence to an action against a shareholder for calls, that at the time of making the calls the defendant was an infant; nor that at the time that the defendant became the holder of the shares, he was an infant:—*Semble*, a plea of infancy to such an action ought to show that the defendant had repudiated the contract on his attaining his full age; his appearing by attorney is not equivalent to an averment that he had attained that age; nor is the plea a sufficient repudiation of the contract.—*Semble*, also, that the 8 & 9 Vict. c. 16, does not render all infant shareholders liable for costs.

DEBT for calls.—The declaration stated, that the defendant is the holder of divers, to wit, ten shares, in the said Company, and is indebted to the said Company in the sum of 300*l*., parcel of the said sum above demanded, in respect of a certain call of, to wit, the sum of 5*l*. upon each of the said shares, and of a certain other call &c. [setting out six other calls.] Whereby an action hath accrued to

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the said Company, by virtue of "The Companies Clauses Consolidation Act, 1845," and "The Leeds and Hartlepool Railway Act," 1846; yet the defendant has not paid the said sum above demanded.

Third plea—As to so much of the said first count as relates to the defendant being indebted to the said Company as aforesaid, for and in respect of five of the said calls therein mentioned, and as to the said alleged debt, and the causes of action in that count mentioned as to those calls, the defendant says, that at the time of the making of those five calls, and each of them, and of the contracting of the said debt in respect of the same, he, the defendant, was an infant within the age of twenty-one years, to wit, of the age of twenty years. Verification.

Fourth plea—As to so much of the said first count as relates to the defendant being indebted to the said Company as aforesaid, for and in respect of two of the said calls therein mentioned, being the remainder of the said seven calls, and as to the causes of action in that count mentioned as to those two calls, the defendant says, that, at the time of his becoming and being holder of the said shares for and in respect of which those two calls were made, and of the contracting of the said debt in respect of those two calls, he, the defendant, was an infant within the age of twenty-one years. Verification.

Special demurrer to the third and fourth pleas, assigning for cause to each of them, that it is pleaded to a supposed contract made between the plaintiff and the defendant, whereas no such contract is alleged to have been made; and that it is uncertain what is meant by the contracting in the plea mentioned; and that the said plea does not sufficiently confess and avoid the said portion of the said first count; that it does not show, with sufficient or any certainty, why the defendant should not pay or is not indebted for the calls made in respect of shares of which he was the holder; that it does not deny, with sufficient or any cer-

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tainty, that the defendant is the holder of the said shares or any of them, in the declaration mentioned, as therein mentioned, or was such holder before or at the time of making the said calls.

Joinder in demurrer.

Cowling, in support of the demurrer (*a*). An infant may become a shareholder by operation of law, and the Companies Clauses Consolidation Act recognises his being so, the 79th section providing for his voting (*b*); and if he may be a shareholder, as long as he is so, he must be liable, and take the burthen with the benefit: Bac. Abr. "Infancy," (F.); *Evelyn* v. *Chichester* (*c*); *The King* v. *Sutton* (*d*). The defendant appears by attorney, and therefore he must now be taken to be of age; and being so, there is no repudiation by him. [*Parke*, B.—You cannot take his appearing by attorney as an averment that he was of age at the commencement of the suit. That, the plaintiff could not traverse.] But still he may be of age, and if so, he has not repudiated the shares; and if he is not now of age, he ought so to have set up his defence. The term "shareholder," in the 21st and 22nd sections (*b*), must mean the same as "shareholder" in the 29th; and if the Court holds that an infant is not liable for calls under the former sections, they must also hold that he would not be bound by a forfeiture under the latter; and the effect would be, that the Company would be compelled to register him under the 18th section, and that he would, as a shareholder, be entitled to dividends, and still not liable to the payment of calls, or to the forfeiture of his shares for nonpayment; which could not have been the meaning of the act. A shareholder means a person who can hold shares; and inasmuch as an infant can hold shares, he must be liable for calls. He also cited *The*

(*a*) Before *Parke*, B., *Rolfe*, B., and *Platt*, B.

(*b*) See sections, ante, p. 637.

(*c*) 3 Burr. 1717.

(*d*) 3 A. & E. 597.

Cork and Brandon Railway Company v. *Cazenove*(*a*), *Corpe* v. *Overton* (*b*), and Com. Dig. "Enfant," (C. 2).

Prentice, contrà.—This case is not distinguishable from *The Newry and Enniskillen Railway Company* v. *Combe* (*c*). The common plea of infancy in actions upon deeds is sufficient—"that the defendant was an infant at the time of the execution of the indenture;" and any ratification since his attaining his age, ought to come from the plaintiff: *Cohen* v. *Armstrong* (*d*), *Williams* v. *Moor* (*e*). [*Parke*, B.—Those were cases of purchase of shares. Would it do in an action of debt on an indenture of lease to plead, that, at the time of the execution of the indenture, the defendant was an infant? Must not the plea also aver, that he had not held the premises at the time that the rent became due? Is it in this case enough for the defendant to say that he was an infant at the time of the call or of his becoming a shareholder, without disavowing the shares when he can purchase and hold them; ought not the plea to go further, and to allege, that although the defendant did purchase the shares, he has repudiated them?] Infancy primâ facie is a defence; and if the defendant has not repudiated the contract, the plaintiff ought to reply a ratification; but if a repudiation be necessary, the defendant by his plea repudiates the contract. [*Parke*, B.—Not the shares, but the call, and that, after the commencement of the suit, if a repudiation be necessary, the plea is not equivalent to it.] He cited *Kirton* v. *Elliott*(*f*), *Shaw* v. *Rowley*(*g*), *Belfast and Down Railway Company* v. *Strange* (*h*).

(*a*) 11 Jur. 802; *S. C.*, 34 Leg. Obs. 464.
(*b*) 10 Bing. 252.
(*c*) Supra.
(*d*) 1 M. & S. 724.
(*e*) 11 M. & W. 256.
(*f*) 2 Bulst. 69.
(*g*) Ante, p. 47; *S. C.*, 16 M. & W. 810.
(*h*) Ante, p. 548; *S. C.*, 1 Exch. 739.

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Cowling, in reply, cited *Ketley's case*, 1 Brownl. 120.

Cur. adv. vult.

ROLFE, B., now delivered the judgment of the Court.—This was an action by the Company for calls; and there were two pleas. In one of them the defendant pleaded, that, at the time of the making of five of the calls, (there were seven altogether made), he was an infant; and the other plea was, that, at the time he became the holder of the other shares, he was an infant. To those pleas there was a demurrer. The pleas in this case do not contain the allegation on which this Court proceeded in distinguishing the recent case of *The Newry and Enniskillen Railway* v. *Combe*, from that of *The Cork and Brandon Railway Company* v. *Cazenove*, reported in 11 Jur. 802. There is no averment here, that the defendant was the original contractor for the shares with the Company, nor that he avoided the contract, as there was in that case. The defendant in the present case may have received these shares by will, or by devolution upon him by operation of law, or have purchased them from the original contractor; and he cannot be assumed to have repudiated them. *The Cork and Brandon Railway Company* v. *Cazenove* has decided, that, under these circumstances, an infant is bound; we shall therefore act on that case. We do not indeed see how we can infer, from the pleadings in this case, that the defendant was of full age at the commencement of the suit, as the Court of Queen's Bench did, from the pleadings before them; which pleadings, however, are not fully reported, the assumption of full age being one of the grounds on which the Court proceeded in that case. We think we cannot, in this case, consider that admission to be made; for his appearance by attorney (the only matter in this plea from which such an inference can be drawn) is not equivalent to an averment in the plea, that the defendant was of full age before the commencement of this suit, or at the time of the plea pleaded. It is an act

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done in court by the defendant, anterior and collateral to the pleadings, and not involving any issue on the plea. The defendant, if an infant, may reverse the judgment in a court of error, whatever the result of the issue may be. But the Court of Queen's Bench did not proceed on that ground only; nor only on the ground that the statute made all infants liable, in which we cannot concur, as we have already decided in the case of *The Newry and Enniskillen Railway Company* v. *Combe;* but also on the ground stated by Lord *Denman*, that if there were any special circumstances that prevented the defendant from being liable, it ought to have been shewn by the defendant. The case in the Queen's Bench, being in this respect exactly like the present, governs it; and there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

COURT OF EXCHEQUER.

Easter Term, 1848.

GROTE *v.* THE CHESTER AND HOLYHEAD RAILWAY COMPANY. *April 29th.*

In an action by a passenger against a Railway Company, for compensation on account of injuries sustained by the breaking down of a bridge on the line, alleged to have been improperly made, but which had been constructed under the superintendence of a competent engineer, the Judge directed the jury, that the question for them to consider was, whether the bridge had been constructed and maintained with sufficient care and skill, and of reasonably proper strength with regard to the purposes for which it was made:—*Held*, that the direction was right.

Semble—In such case, the mere employment of a competent engineer would not exonerate the defendants, unless he had used reasonable care and proper materials in the construction of the works.

THE declaration, which was in case, after reciting that the defendants had been established and incorporated by Act of Parliament for the making of a railway from Chester to Holyhead, and that the defendants, in pursuance of that act, had constructed a portion of the line, and also, amongst

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other works, a bridge over the river Dee; and that, before and at the time of the grievances, a certain other Railway Company, to wit, the Shrewsbury and Chester Railway Company, by the license and permission of the defendants, and for hire and reward therefore paid to them, used the said part of the said railway of the defendants, and the said bridge and other works of the defendants, for the carriage and conveyance of passengers on and over the said part of the railway, in certain carriages of the Shrewsbury and Chester Railway Company, and at a certain great speed and velocity, for reward therefore paid by the said passengers of the last-mentioned Company; of all which premises the defendants, during all the time aforesaid, had due notice; and the defendants during all the said time had full notice, as the fact was, that the said part of the said railway of the defendants could not safely or securely be used as aforesaid, nor the said passengers safely or securely carried or conveyed on or over the said part of the said railway of the defendants, unless as well the said part of the said railway of the defendants, as the said bridge and other works, were by the defendants carefully and skilfully, and with proper and sufficient materials, constructed and maintained; and after reciting, that, after the said part of the said railway of the defendants had been made, and the said bridge and other works made and constructed as aforesaid, and whilst the said part of the said railway, and the said bridge and other works, were so used by the said Shrewsbury and Chester Railway Company, in manner and for the purposes aforesaid, and whilst the defendants had such notice as aforesaid, to wit &c., the plaintiff became and was a passenger on the said part of the said railway of the defendants, to be safely and securely carried and conveyed by the said Shrewsbury and Chester Railway Company, in one of their carriages, on and over the said part of the said railway of the defendants, for hire and reward to the said Shrewsbury and Chester Railway Com-

pany, therefore paid by the plaintiff to the said last-mentioned Company, and the said last-mentioned Company then received the plaintiff to be so carried and conveyed as aforesaid; yet that the defendants, disregarding their duty, did not nor would skilfully, carefully, sufficiently, and properly construct, make, and maintain the said part of the said railway of the defendants, and skilfully, carefully, sufficiently, and properly make, construct, and maintain the said bridge and other works, so that the same respectively could safely and securely be used in manner and for the purposes aforesaid; but on the contrary thereof, the defendants so negligently, unskilfully, insufficiently, and improperly made and maintained the said part of the said railway of the defendants, and so negligently, unskilfully, insufficiently, and improperly made, constructed, and maintained the said bridge and other works, that the said part of the said railway of the defendants, and the said bridge and other works respectively, could not be safely or securely used in manner and for the purposes aforesaid; and that, whilst the plaintiff, as such passenger as aforesaid, was being carried and conveyed in manner and on the occasion aforesaid, by the Shrewsbury and Chester Railway Company, in one of their carriages, on and over the said part of the said railway of the defendants, and before the commencement of this suit, to wit, on &c., by and through the aforesaid negligence, carelessness, and improper conduct of the defendants in and about the making and maintaining of the said part of their said railway, and in and about the making, constructing, and maintaining of the said bridge and other works, the said bridge became and was broken and dislocated, and the plaintiff was precipitated and thrown from the bridge, and thereby became and was greatly cut, wounded, and bruised, &c.

Plea—not guilty.

The cause was tried before *V. Williams*, J., at the last Spring Assizes for the county of Chester. It appeared that

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the action was brought against the Company, to recover compensation for injuries sustained by the plaintiff in consequence of an accident to a passenger train in which the plaintiff was, caused by the breaking down of a bridge crossing the river Dee. The bridge formed a portion of the Company's line, and had been constructed under the superintendence of an eminent engineer. The learned judge directed the jury that the question for them to consider was, whether the bridge was constructed and maintained with sufficient care and skill, and of reasonably proper strength—regard being had to the purposes for which it was made—and that, if they thought that it was not, and that the accident was attributable to any deficiency in that respect, then that the plaintiff was entitled to a verdict. The defendants' counsel at the trial objected to this ruling, and contended that the defendants would not be liable unless they had been guilty of negligence in the construction or maintenance of the bridge. The plaintiff had a verdict.

The *Attorney-General* now moved for a new trial, on the ground of misdirection.—The gist of this action is negligence; and the learned judge ought to have left it to the jury to consider whether *the defendants* had been guilty of negligence or not. If he had so left it to the jury, they would have found that they had not; inasmuch as it appeared that the bridge was constructed under the superintendence and management of a most eminent engineer. [*Parke*, B.—Would not the Company still be liable, unless the engineer used proper materials, and due and reasonable care in the construction? It appears to me that they would.] It is submitted that they would not, in such case, be liable. The correct rule is laid down by *Alderson*, B., in *Sharp* v. *Grey*(*a*), where he says, "A coach proprietor is liable for

(*a*) 9 Bing. 459.

all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered on investigation." [*Parke*, B.—There the coach proprietor is liable for an accident which arises from an imperfection in the vehicle, though he may have employed a competent coachmaker.] The learned judge ought also to have left the question of negligence to the jury with more distinctness.

POLLOCK, C. B.—It does not distinctly appear to me that the attention of the jury was directed to the proposition, that, if a party in the situation of the defendants employ a person fully competent to the work, and the best method is adopted by him, and the best materials are used, such party would not be liable for an accident of this nature. If the jury were so directed, there would be no ground for this rule. It never can be contended that the defendants are not responsible for the accident, merely because they have employed a competent engineer in the construction of the bridge. However, we will consult the learned judge who tried the cause.

Cur. adv. vult.

On a subsequent day, POLLOCK, C. B., said, that they had consulted the learned judge, who had reported that he had directed the jury in conformity with the views of the Court above expressed.

Rule refused.

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COURT OF EXCHEQUER.

Trinity Term, 1848.

June 15*th*.

DODGSON *v.* SCOTT.

It is no answer to a motion for leave to issue a scire facias against a former member of a Joint-stock Company, upon a judgment recovered against the public officer, that the judgment was fraudulently concocted; such defence must be raised by plea, or by motion to set aside the proceedings.

THIS was a rule which had been obtained by *Martin* on behalf of the plaintiff, public officer, calling upon John Brooke to shew cause why execution upon a scire facias should not issue against him on a judgment recovered against the public officer of the Newcastle Joint-stock Banking Company, he the said John Brooke having been a member of that Company at the time that the contract was entered into, but who had ceased to be so at the time of the recovery of the judgment.

Watson, *Cleasby*, and *Willis* now appeared and shewed cause; and the *Attorney-General* and *Martin* appeared in support of the rule (*a*).

Cur. adv. vult.

Where a rule, to issue a scire facias upon a judgment recovered against the public officer of a Joint-stock Company, had been obtained by the plaintiff against a former member, under the 7 Geo. 4, c. 46, s. 13, which rule had been abandoned: —*Held*, that the plaintiff was not precluded from applying again to the Court for leave to issue a scire facias against the same party; and *quære*, whether he would be, if the first application had been finally disposed of by the Court.

Semble, that the general rule which prohibits the moving the same matter a second time, does not apply to a case of an application for leave to issue a scire facias on fresh materials.

The class of persons intended by the 13th sect. of 7 Geo. 4, c. 46, as "the members for the time being," are those who at the time of the execution were members of the Company; in proceeding, therefore, under that section, the proper course for a plaintiff who has recovered judgment against the public officer to pursue is, in the first instance to issue writs against those persons who are at that time members of the Company; but the plaintiff may proceed against the other classes which the statute renders liable, if he can satisfy the Court that every reasonable and proper effort has been made to obtain payment of the debt from those who are primarily liable.

Those persons who have become partners of a Joint-stock Company after the contract was completed, and have ceased to be so before judgment obtained against the public officer, are not subject to any liability under the act, although they were partners at the time the action was commenced.

(*a*) Before *Parke*, B. The arguments are here omitted, as they are fully stated by his Lordship in his judgment.

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PARKE, B., now(a) delivered judgment.

This case, which was argued before me yesterday, I cannot help regretting that I should be called upon to decide, as it is one which involves a very important rule of practice, and also some important questions of law, arising on the construction of the statute upon which the matter depends. However, it became impossible to dispose of the matter before the full Court, and I have now to pronounce my decision upon the questions which come before me; this I am happy to be able to do, with the assistance of the Court upon the principal point, all of its members concurring with me in opinion, that no rule of practice prevents me from entertaining this application. With regard to the other parts of the case, I shall pronounce my opinion according to the best judgment I can form upon it.

The principal point is, whether it is now competent for me to entertain this application. Upon this I have had the assistance of the other judges of this Court, and I have also conferred with some of the judges of the Court of Queen's Bench. This is an application under the stat. 7 Geo. 4, c. 46, s. 13, for permission to issue a scire facias against Mr. Brooke, who is alleged to have been a member of the Banking Company, here sued in the name of their public officer, at the time the contract sued upon was entered into by that Company with the plaintiff. Several objections were taken to the plaintiff's right to this rule, one of which was disposed of in the course of the argument; namely, that the judgment was a judgment which was fraudulently concocted, to the prejudice of the proprietors in the Joint-stock Bank. If there is anything in the objection, there is no doubt the defendant must avail himself of it, either in the form of a plea to this scire facias, or in the form of an application specially for the purpose of setting aside the pro-

(a) June 16.

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ceedings as fraudulent; and I have now, therefore, to address my attention only to two other points which were moved before me. The first of these, then, is, is it competent for me to entertain this application at all, the objection being, that it has been already disposed of in such a way as, according to the established practice of this Court, to preclude any further inquiry? Several cases were cited to shew to what extent the Courts had gone in laying down the rule, that, after an application to them has been made, and has failed on account of defective materials, they will not allow any further inquiry. There is no doubt that such is the established practice of the Court of Queen's Bench, as appears from the cases which have been cited, and I presume it to be the practice of the other Courts also. That practice appears not to have been first adopted, but sanctioned, by a rule of the Court of Queen's Bench of Hilary Term, 3 Jac. 1, by which it was made highly penal if a matter had been disposed of in the presence of both parties, to agitate the same matter again; and that, upon the principle that where there had been a judgment upon the case, it was conducive to the due administration of justice that the matter should not again be agitated. Now there can be no doubt that the Courts have gone beyond that part of the rule which requires the matter to have been disposed of in the presence of the counsel of both parties, because they have held a party equally bound, where the rule which he has obtained was discharged, although he himself, or his counsel who had obtained the rule, was never heard. Many cases were cited as having been recently disposed of in the Court of Queen's Bench on the general principle I have stated: *Reg.* v. *Orde* (*a*), *Reg.* v. *The Manchester and Leeds Railway Company* (*b*), *Reg.* v. *The Inhabitants of Barton* (*c*), *The King* v. *Pickles* (*d*), *Reg.* v. *Great Western Railway*

(*a*) 8 A. & E. 420.
(*b*) Id. 413.
(*c*) 9 Dowl. 1021.
(*d*) 12 L. J., Q. B. (N. S.), 40.

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Company(*a*); in all of which the rule was recognised, that if there has been an application to the Court, and the matter has been disposed of by the Court, the parties will not be allowed to re-agitate the same matter. An exception indeed exists, in cases where the affidavits have been wrongly intitled, or there has been a defect in the jurat. None of these cases go the length of saying that under no circumstances can the party make an application to the Court on fresh materials, nor do I understand that the Court of Queen's Bench has so decided. To that question, however, it will not be necessary further to advert in the present case, because it does not appear upon these affidavits that any fresh materials have been obtained; and therefore the question will turn upon quite a different point, upon which I am to pronounce my judgment, and in which the rest of the Court concur. Most of the cases which have been cited, are, it is to be observed, cases in which the matter is determined finally by the decision of the Court. Every one of them, indeed, is of that description, except the case of *The King* v. *Bowdick*(*b*), in which there was an application made for a criminal information, which was refused on the ground of there not being sufficient evidence of the defendant's handwriting; and the Court, upon a subsequent application, would not allow the plaintiffs to amend the case by producing affidavits to the handwriting of the defendant. That decision went simply upon the ground that a criminal information was an extraordinary remedy, and that a party having taken his chance once, there was no reason why he should have a remedy given him on a second application, the law being open to him to proceed by way of indictment. In the present case, the first question is, whether the same rule applies to a case in which the plaintiff, having obtained a rule, afterwards chooses to

(*a*) Ante, Vol. 3, p. 700; 5 Q. B. 597. (*b*) 2 Chit. 278.

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abandon it. A rule was obtained on the 29th of May, 1847, for leave to issue a scire facias against Mr. Brooke, upon such affidavits as were then prepared. The rule was enlarged; no cause was shewn in the course of Trinity Term, and it was then further enlarged, to shew cause in Michaelmas Term. In the meantime, on the 7th of January, 1848, the plaintiff gave notice of his intention to abandon the rule and pay the taxed costs of it, which offer was accepted and those costs paid. Must, then, the matter be considered as having been finally disposed of by the Court? for if it has, and the plaintiff's application is to be understood as having been once refused, it will become necessary to consider the next question, namely, whether this case forms an exception to the general rule, which prohibits the moving the same matter a second time. As to this latter point, I am by no means prepared to say that it does not, and in this the rest of the Court concur with me; without, however, meaning to give a binding decision upon the point,—for we feel a difficulty in applying the same strict rule to an application for a writ which is required by statute, and which is given in lieu of an action,—there is no doubt that if the plaintiff had issued a scire facias against one or more members, or several writs of scire facias, (supposing it to be competent for him to do so), in the first instance, against those who were the parties "for the time being," and he had been nonsuited in one of those actions of scire facias, he would have been at liberty, and without leave of the Court, to proceed again by a second scire facias, and so on toties quoties, until the proceeding had been determined by a verdict for the plaintiff or the defendant; and this being an application to the equitable jurisdiction of the Court to have a remedy against a second class of persons, it would be difficult to say that the Court should be so bound up by any rule, as that they would not permit a second application to be made, or a second scire facias to issue, in case

the first had failed; but I agree, that in such a case it would be proper that the party applying a second time to the Court for permission, should lay before it some ground why he had failed upon the first, and show some good reason why he should apply to the Court a second time to make the defendant liable to a scire facias. I have before observed, that upon looking through the affidavits there is no explanation why the first scire facias was abandoned, and no new facts are said to have been discovered by the plaintiff, to justify him in making a second application to the Court. There is no affidavit, that, at the first time the application was made, they had made what they thought a sufficient inquiry, but that since, on making further inquiry, they had discovered clear evidence of the insolvency of some of the parties, whereon to justify the application to the Court on new facts. The affidavits do not contain a word of that. All I know upon the affidavits is, that in the first instance the plaintiff obtained a rule, and afterwards, for some defect or other in the affidavits, (what it was does not appear), he has again applied to the Court.

The question here then is, whether, simply because the plaintiff has obtained a rule, and abandoned it under the circumstances here stated, he is to be considered as bound in the same way, in which he would be bound by a decision of the Court, on the case coming before it and being disposed of. This depends entirely upon what the effect is of the plaintiff withdrawing his application.

On the 7th of January, 1848, this rule having been twice enlarged, the plaintiff gave the following notice to Mr. Brooke: "Take notice, that the plaintiff hereby abandons the rule nisi made in this cause on the 29th of May last, whereby it is ordered that John Brooke therein named shew cause on Friday the 4th of June next, why a writ of scire facias on the judgment obtained by the plaintiff in this cause, should not issue against him as a member of the Newcastle Joint-

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stock Banking Company; and the plaintiff in like manner abandons the rules subsequently made for enlarging the said rule of the 29th of May last; and the plaintiff hereby offers to pay any costs which may have been properly incurred in consequence of the said rule, to be taxed by the Master." To that proposal Mr. Brooke accedes, and the costs of these proceedings are taxed and paid accordingly; and the question really is, what is the bargain between the parties? Is it a bargain that they should be placed in precisely the same situation as if the rule had been brought on and disposed of by the Court; or is it an offer merely to withdraw the writ, and that the plaintiff should stand in the same situation as if that writ had not issued at all? If the latter construction is to prevail, and the party is to be in the same situation as if the rule had been disposed of by the Court, then I think the plaintiff must fail in this application, for the reasons I have mentioned, namely, that he has not shown any satisfactory ground upon his affidavit, why this case is different now from what it was on the 29th of May, 1847, at the time he first made the application. But if the meaning is this: "I will agree, to withdraw what I have already obtained, and to stand in the same situation as if the rule had not issued, and will now at once offer to pay you the costs of that rule; but if you choose to go on, then the matter must be tried in Court, and you must take your chance of succeeding or not; but I make the offer to you, to abandon my application altogether, if you will consent to receive the taxed costs of it;" then the plaintiff will be at liberty to renew the application. It is really a mere question of construction upon the agreement between the parties; and, having conferred with my brother judges upon that subject, we are all of opinion that the real meaning of the contract is, that the former application was to be withdrawn, Mr. Brooke consenting to receive the costs absolutely;

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whereas, if the matter had gone on, in case of a refusal, the plaintiff would peradventure have succeeded: at least, he would have had his chance of succeeding.

The question then will be, whether, supposing that this was a new application to the Court, founded upon this affidavit, the plaintiff would be entitled to succeed, and whether permission ought to be given to him to issue a scire facias against Mr. Brooke; and the question which arises in the first instance is, whether he was a partner at the time of the contract entered into. I do not trouble myself with that part of the affidavits which disputes that fact, because that is a matter which must be tried upon the plea to the scire facias; but I direct my attention to the other facts of the case, many of which, it is very properly argued, if not all, could not be questioned upon any issue to the writ of scire facias; and therefore I must take care, to the best of my ability, to be right in forming my judgment upon them. Now, the objections which are made to the issuing of this scire facias are, first, that the plaintiff has not taken the proper steps in the first instance, by issuing a scire facias against the proper persons primarily liable; and secondly, that, supposing the plaintiff has done that, then, upon these affidavits, there is no sufficient case made out for the interference of the Court, in granting this scire facias against the party to the contract, because other writs of scire facias have been sued out against other parties; and that it is yet undetermined that the result of them will be fruitless.

The first and important question in the case, which I very much regret that I should have for the first time to determine, although there are dicta upon the subject, and a prevalent opinion respecting it, is, what class of persons are meant to be designated by the statute under the description of persons "for the time being." It cannot be denied that this statute is very inartificially framed; and

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I have no doubt that the person who prepared the 13th clause, had in his mind an idea which the recent decisions shew was erroneous. There is no doubt but that the framer of that clause supposed, that as soon as a judgment was obtained against the nominal defendant, the public officer, it would be competent to the plaintiff to issue immediately execution against those persons who were partners in the concern; and that there need not, previously, be a suggestion upon the record, or a writ of scire facias, or any other proceeding. In that respect he was wrong; because it was decided, in Ireland, that you could not make a person liable who was not made a party to the record by some proceeding or other; and in the case of *Barton* v. *Hunter* (*a*), before *Bushe*, C. J., the course approved was, that there should be a suggestion on the record, that being thought to be the proper technical mode of introducing facts upon the record which did not appear upon the record before. In the case of *Bartlett* v. *Pentland* (*b*), the Court of Queen's Bench concurred in opinion with the Irish Court, that it was not competent for the plaintiff to issue a process of execution against a person who did not, upon the record, appear to be a party to the judgment; the Court intimating that a suggestion was the proper mode of making him a party to the record. It was subsequently, however, considered (and very properly), that this was not the technical mode of proceeding; but that the proper mode was by issuing a scire facias against the persons who were partners at the time, to give them an opportunity of pleading to the scire facias that they were not partners; and if they were, then they would properly become liable to the judgment on the record: *Ranelford* v. *Bosanquet* (*c*), *Cross* v. *Law* (*d*), *Whittenburg* v. *Law* (*e*), *Harwood* v. *Law* (*f*), *Clowes*

(*a*) 1 Hud. & Br. Ir. Rep. 569.
(*b*) 1 B. & Ad. 704.
(*c*) 12 A. & E. 813.
(*d*) 6 M. & W. 217.
(*e*) 6 Bing. N. C. 345.
(*f*) 7 M. & W. 203.

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v. *Brettell* (*a*). Now I think it cannot be denied, that the class of persons who must have been liable to an execution in the first instance, if the notion of the framers of the act had been carried into effect, is the same class that must now be proceeded against by scire facias in the first instance. It is impossible to see who would be partners at the time of issuing the actual execution; and no other date, therefore, can be assigned as the time of their being partners, than the issuing of the scire facias, that is, the beginning of the execution. I think that is a matter which does not admit of the least doubt; and the question is, what is the class of persons who are to be liable according to the terms of this clause? Now it is a good rule to go by, in the interpretation of a statute, to act upon its grammatical construction, unless it leads to some incongruity or manifest absurdity. The words of the clause are "execution upon any judgment obtained against any public officer for the time being, of any such corporation or copartnership, carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members, *for the time being*, of such corporation or copartnership." What is the grammatical construction of the words, "for the time being?" Surely, they mean for the time being of the act with respect to which it is spoken; this must, therefore, be an execution against the persons who, at the time of the execution, were members of the banking Company. That is, undoubtedly, the grammatical meaning of the terms "for the time being," to whatever subject they apply, or to whatever act they apply. The legislature is considered as speaking of persons who fill a particular character at the time of the act about to be done, unless it can be shewn by the context that there was clearly a different meaning to be put

(*a*) 10 M. & W. 506.

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on the words. Mr. *Cleasby*, in a very able argument, suggested that the context shewed this, and that there would be a great hardship in making persons liable upon contracts who were not liable at the time of the contract made; and that the proper meaning of the terms "for the time being," must be persons who were members of the Company at the time of the commencement of the original action. That, as I have said before, is surely not the grammatical construction of the words; and besides, it would let in an absurdity as great, or nearly so, as any which would follow from using the terms in their ordinary grammatical sense; because it makes the persons liable at the commencement of the action, who were not liable at the time of the contract made. It is quite impossible, looking at this Act of Parliament, to say, that the legislature meant to restrict the creditor to the common law liability of the debtors; for the statute really made three other classes of persons liable besides those who are liable by the common law. It makes, in the first place, those liable who were parties at the time of the execution; and then, in failure of these, those who were members of such co-partnership at the time the contract or agreement on which such judgment was obtained was entered into. This is the common law liability; but the statute does not confine the remedy to persons who were partners at that time, for it goes on to extend it to those who become members "at any time" before such contract was executed; so that, in the case of executory contracts, those are liable who are partners at the time of the execution of the contract; and they were not liable at common law. And, in the next place, it makes those liable who were members "at the time of the judgment obtained;" and these also are not liable at common law. It is therefore perfectly clear, that this statute means to impose some additional liability beyond that which the com-

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mon law imposed on the members of these copartnerships. I think there is no doubt that the object of the legislature was to accomplish a thing which it is very difficult to accomplish, namely, to treat these bodies as corporations as to the mode of suing them; and further, not to confine the remedy of the creditor to the partnership property, but to make each individual partner personally responsible for the debts of the partnership. The object of the legislature in allowing execution to be taken out against persons who were not liable as contracting parties, and also against those in the second degree, who were partners at the time of the contract executed or judgment obtained, and not at the time of the contract made, was upon the supposition that these persons had all the means of applying the funds of the society, and ought to have applied them to the payment of the partnership debts; and probably they considered that persons who were actual members at the time the execution issued, and when the debt, therefore, ought to be paid, were the persons who in the first instance ought to be looked to, to take care that the partnership funds were applied to the payment of the debts; and that, if they did not choose to apply them, or had not the means of applying them, they should be responsible in their own persons for their due payment. That seems to be the principle upon which the legislature acted—a principle of some harshness towards those who were not members when the contract was made. But then there is no doubt, as the Attorney-General has observed, that this act was framed upon the supposition that these Companies would be always solvent, and would have funds with which to meet their debts. If that be the correct view, the effect is to make those liable who are partners at the time the execution issues; and then, in the event of an execution against them being unsuccessful, the remedy is to be taken against those who were partners at the time of the contract, against those who were so at the time of the contract being completed,

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and against those who were so at the time of the judgment being obtained. It is to be observed, that the legislature has let slip one class of persons, whether intentionally or not I do not know, namely, those who have become partners after the contract was completed, and have ceased to be so before judgment obtained, although they were partners at the time the action was commenced. That case the legislature did not provide for; and these persons are certainly exempt, for there are no words to embrace them. My opinion therefore is, that in this instance the plaintiff, by taking his remedy, by issuing writs of scire facias, against the existing members of the Company,—I mean those existing at the time the scire facias was obtained,—has pursued the proper course; and that he was not bound to take out any scire facias, and would have been wrong to have taken out any scire facias, against those who were partners at the time that the action was commenced.

I come, therefore, to the last question, whether or not the plaintiff has entitled himself to this interference of the Court by the steps which he has taken against those different persons who were members for the time being. Now, the affidavits state, that there are a great number of persons who were partners in this concern, against whom it would be undoubtedly hopeless to take any proceedings. Seven writs of scire facias have been issued, which promise a result of about 130*l.* altogether. But then it is said, that there are two persons against whom no effectual steps have been taken in order to make them responsible, and against whom proceedings might be taken with effect. Against one a scire facias issued, and it is objected, that the present proceeding ought not to be allowed until that writ has come to its determination, and been finally disposed of. Now, if I am satisfied that that writ would produce no result whatever, or no result worth the expense of proceeding in it, then the pendency of such scire facias is no answer to this application; and I take it that is the principle

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of the case which was referred to as lately decided in the Court of Common Pleas (*a*), in which *Wilde*, C. J., seems to have thought at first that you must issue a scire facias against every individual member for the time being, before you can apply to the Court for its interference against a person who was a member at the time of the contract made. That opinion was overruled by the rest of the Court, who thought it was enough if they were satisfied that every reasonable and proper effort had been made for the purpose of obtaining payment of the debt due to the creditors, by recourse to those who were primarily liable. That is the rule upon which I think I must act in the present case; and, referring to the affidavits, in the first place, with regard to the persons against whom the scire facias is pending, it appears to me that, looking to the affidavits on both sides, there seems to be no reasonable ground of expectation that anything will be obtained from that scire facias. The defendant there, it appears, was the promoter, and was a trustee for a Scotch insurance office, and he accepted the shares as such trustee. I think it is impossible to make the partners in the Scotch insurance office liable through his instrumentality directly; but then it is said, that if he were to pay the amount he would have his remedy in equity against the cestui que trust. And supposing that was not so, still, if he were sued and the scire facias were pursued to execution, the probability is, that the members of the Scotch Company would not leave him to pay the debt, but would come forward upon a principle of honour and discharge him. I think that is rather too remote a contingency for me to say that any good result can reasonably be expected to be produced from that scire facias, unless the defendant is himself a person in solvent circumstances. Now, the affidavits on the part of the plaintiff show that he is not a man likely to pay any rea-

(*a*) *Field* v. *M'Kenzie*, 16 L. J., C. P., 203.

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sonable portion, or indeed anything, of the considerable debt which is in dispute in this action, while the affidavits on the other side, although they say that he is apparently carrying on business, do not remove that impression from my mind. The same also may be said with regard to the other individual, who is stated to be a person possessed of considerable property. The affidavits on the other side say, that the property is greatly encumbered by mortgage beyond its real value, and that therefore any proceeding against him must be hopeless. I therefore think, that in this case the plaintiff has done what the majority in the Court of Common Pleas, and ultimately, I believe, my Lord Chief Justice *Wilde* said was necessary in such a case. A similar rule, I think, was previously laid down in the Court of Queen's Bench (see *Eardley* v. *Law* (*a*), and *Harvey* v. *Scott* (*b*).) The rule is, that all that is requisite in this case is, that a scire facias should issue against an existing member or members, and that there should be a reasonable certainty that all remedies against that class would be ineffectual. I am satisfied of this, and therefore the rule must go.

Rule absolute.

(*a*) 12 A. & E. 802. (*b*) 17 L. J., Q. B., 9.

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COURT OF QUEEN'S BENCH.

Hilary Term, 1848.

THE QUEEN *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Jan. 19*th.*

MANDAMUS to the London and South Western Railway Company, to issue their warrant to the sheriff of Surrey, requiring him to summon a jury to assess compensation to J. H. Coward, Ellis Cancellor, and T. B. Illidge, the pro-

A Railway Company gave notice to landowners, under the 8 & 9 Vict. c. 18, s. 18 (*a*), that they required to pur-

chase part of certain premises. The owners of the premises thereupon gave notice to the Company, under s. 92 (*b*), that they required them to purchase the whole of the premises, and a mandamus was obtained commanding the Company to issue their precept for summoning a jury to assess compensation for the whole:—*Held*, that although the 92nd section protects the owners from being obliged to sell a part, it does not compel a Company wanting a part only, to take the whole, and that the mandamus having claimed the whole, could not go for a part only.

(*a*) Sect. 18, (Lands Clauses Consolidation Act). "Where the promoters of the undertaking shall require to purchase or take any of the lands, which by this or the special act, or any act incorporated therewith, they are authorised to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this act to sell and convey or release the same, or such of the said parties as shall, after diligent inquiry, be known to the promoters of the undertaking, and by such notice shall demand from such parties the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works."

(*b*) Sect. 92 enacts, "that no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or othe building or manufactory, if such party be willing and able to sell and convey the whole thereof."

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secutors, in respect of their estate and interest, as well in the lands and premises mentioned in the notice given to them by the said Company as in the remaining part of the manufactory premises known by the name of "The Lambeth Starch Manufactory." The writ recited that the prosecutors were lessees of the premises in question, and carried on the business of starch manufacturers there in partnership; that, on the 14th of May, 1846, the Company, being the promoters of the undertaking mentioned in the writ, gave a notice to the prosecutors, and all other persons whom it might concern, demanding the particulars of their estate and interest in such lands and premises, and of the claims made by them in respect thereof, which notice stated the particulars of the lands and premises (a plan of which was annexed to it), and that the Company were willing to treat for the purchase and as to the compensation to be made to the said parties for the damage by reason of the execution of their works; that the lands and premises specified in the notice were a part only of the said manufactory and premises called "The Lambeth Starch Manufactory;" and that the prosecutors were willing and able to sell their estate and interest in the whole of the manufactory and premises, whereof the Company had notice on the 4th of June, 1846, and within twenty-one days after the service of the said notice by them, and were then required to purchase the estate and interest of the said parties in the whole of the said manufactory and premises; that the said parties had not agreed as to the amount of compensation, the amount of which as claimed exceeded 50*l.*, and amounted to 8000*l.*, for the purchase of the said estate and interest of the prosecutors in the said manufactory, and 35,000*l.* for damages sustained by them; and that the prosecutors had required the Company to issue their warrant for a special jury, which they had neglected to do.

The return by the Company stated, that the prosecu-

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tors were lessees of all the lands, &c. mentioned in the notice of the claimants of the 4th of June, 1846, under a lease for a term, expiring by effluxion of time on the 24th of June, 1847, but that they were not, at the date of the Company's notice, nor at any time since, jointly interested in the said lands and premises for a greater estate or interest than as from year to year; that the lands, &c. in the said writ mentioned consisted of a dwelling-house, with offices attached thereto, and a counting-house, cart-sheds, stables, coach-house, several yards and sheds, two large gardens, a greenhouse, and premises formerly occupied as piggeries, and a slaughter-house, together with a building of one story, used for the manufacture of starch, with a mill or engine-house and drying-room, and warehouses attached thereto; that both the said gardens, which constitute a large part of the said premises, were, at the date of the said notice, and thence hitherto absolutely unused, either as a manufactory or for any other purpose; that the said piggeries and greenhouse were, from disuse, in a state of extreme dilapidation and decay, and neither they nor the slaughter-house had been used in the manufacture of starch or any other manufacture, nor are they or any part of them essential or necessary to the carrying on of any manufacture. The return then set out the notice given by the Company on the 14th of May, 1846, which, after stating that the Company required to purchase the messuage, &c. mentioned in the schedule thereto, and were ready and willing to treat for the purchase of all and any the estate of the prosecutor therein, and as to the compensation to be made for the damage to be sustained by them, required from them, and each and every of them, the particulars of their estate and interest in such messuage, and of the claims made by them and each and every of them in respect thereof.

The schedule to the notice was as follows:—

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No. on deposited Plan of the Work.	Owner or reputed Owner.	Lessee or reputed Lessee.	Present or late Occupier.	Description of Property.	Situation.
577	Thos. Lott & Mrs. Sarah Randall.	Yourselves	Yourselves	So much of the ground, stabling, coach-house, factory, and sheds as are coloured Red on the Plan hereunto annexed.	Prince's-st., Vauxhall.

The return also set out the notice served on the Company by the prosecutors on the 4th of June, 1846, which stated, that the said parties were able and willing to sell and convey to the said Company all their estate and interest in the whole of those premises comprised in the schedule and plan annexed to the notice of the said Company, as well as so much of the said premises as was coloured red in the said plan, and which the said Company required to purchase; as also all and singular the warehouses, &c., and other premises contained within the boundary line of the said plan, and described in the said plan, &c., which said several premises were part and parcel of the said first-mentioned premises in the said plan coloured red; and they made a claim of 2000*l.* for the purchase-money of their estate and interest in the whole of the above-mentioned premises, and 35,000*l.* for damages. The return then stated that the Company thereupon abandoned all intention of purchasing the estate of the prosecutors (if any) in the said premises; that the whole of the said parties are still in peaceable possession of the whole of the said premises, and will so remain, without any disturbance by the Company, until the expiration of their estate and interest therein.

The prosecutors traversed part of the return, and alleged that they were jointly interested in the lands and premises in the writ mentioned, for a greater estate and interest than as tenants from year to year, and demurred to the residue. The grounds assigned for the demurrer were, that the return amounted to an argumentative traverse of the allega-

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tion in the writ; that the premises therein mentioned were all one whole manufactory and premises, called "The Lambeth Starch Manufactory;" and also, that the return did not shew that the premises therein supposed not to be part of the said manufactory were not part of the land and premises, the particulars whereof were stated in the notice of the Company of the 14th of May, 1846, and which the Company themselves required to purchase; and for aught that appeared on the return, it might be that the additional premises which the said claimants required the Company to take were part of the very building in which the manufacture of starch was carried on; and that the return did not shew in what manner the Company abandoned their intention of purchasing the estate and interest of the claimants, nor any consent by the claimants thereto, nor anything which would have legally exonerated the claimants from their liability to sell their estate and interest in the said lands and premises in the writ mentioned.

The Company demurred to the plea, on the grounds that it tendered an immaterial issue, if the claimants did not intend to rely on some joint estate or interest in the said premises greater than a tenancy from year to year, as entitling them to compensation in respect of such joint estate or interest. That if the claimants relied on some joint estate in all of them in the said lands and premises, as entitling them to compensation thereof, the plea was bad, as not shewing what joint estate or interest in particular the prosecutors claim to have in the said lands and premises, or in what respect it is a greater estate than a tenancy from year to year, or by what deed created, or how much of the same was unexpired at the time of giving the said notice by the Company and the prosecutors respectively; or whether it was such an interest as entitled the prosecutors to have the compensation in respect thereof assessed by a jury; and that the Company were unable to traverse the

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legal effect of any deed, by virtue of which such joint estate or interest is claimed, or to traverse the title of the grantors, or to shew that the interest of the prosecutors was not such as entitled them to have the compensation in respect thereof assessed by a jury. That the plea is a departure from the writ, as in the writ compensation is claimed in respect of an unexpired term, under a lease of the 24th of June, 1833, legally vested in J. H. Coward and E. Cancellor only; yet in the plea the compensation is claimed in respect of a joint estate or interest in the said J. H. Coward, E. Cancellor, and J. B. Illidge, in the said lands and premises comprised in the said lease.

Joinders in demurrer.

Martin, Q. C., and *W. R. Cole*, for the prosecutors (*a*).—The Company, after giving notice under the 18th section of the Lands Clauses Consolidation Act, (8 & 9 Vict. c. 18), and making a deposit by way of security, and giving a bond for the payment of the purchase money or compensation, pursuant to the 86th section, may enter upon and use the lands described in the notice; and the 91st section enables them to enforce such entry, in case the owners refuse to give up possession. The landowners are bound by these sections, and because they avail themselves of the protection of the 92nd section, and give notice under it of their refusal to convey a part, and that they require the Company to purchase the whole, the Company are not to be released from taking that which they have given notice to purchase. Where the taking of part would render the remainder useless, the whole ought to be taken. They cited *Rex* v. *Hungerford Market Company* (*b*), *Salmon* v. *Randall*, *Stone* v. *Commercial Railway Company*, *Taylor* v. *Clemson*, in error (*c*). They also contended, that if the mandamus could

(*a*) January 19 and 22, before *Denman*, C. J., *Patteson*, *Coleridge*, and *Wightman*, Js.

(*b*) 4 B. & Ad. 327.

(*c*) Ante, Vol. 1, p. 375.

not be sustained for the whole claim, it might nevertheless go for that part of the premises in respect of which the Company had given notice.

M. D. Hill, Q. C., and *Burnie*, contrà, contended that section 92 contained no words which rendered it compulsory for the Company to take the whole of any building or manufactory in respect of which they had given notice to take a part, though it empowered the owner to refuse to sell less than the whole; and that the mandamus would not go for the part only in respect of which the notice had been given. They cited *Reg.* v. *The London and Greenwich Railway Company* (*a*), and *Walker* v. *London and Blackwall Railway Company* (*b*).

Lord DENMAN, C. J., now (*c*) delivered the judgment of the Court. His Lordship, after stating the substance of the writ, the return, the plea, and the demurrers, proceeded—In addition to these points, the writ was objected to as bad, because it claims assessment for the value of the entire premises, whereas the Company have required part only. The claim is founded on the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18; but, on examination of the sections which were supposed to give this right, namely, the 18th and 92nd, there is not the smallest pretence for an argument to that effect. Section 18 gives directions as to notice to be given by the Company requiring lands, and provides, that "every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damages that may be sustained by them, by reason of the execution of the works." This has been done, as appears by the writ itself; and assuming, for the sake of the argu-

(*a*) Ante, Vol. 3, p. 138. (*b*) 3 Q. B. 747. (*c*) July 12.

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ment, that the prosecutors' premises are one entire manufactory, the notice requires only a part. The other section (92) enacts, "that no party shall at any time be required to sell or convey to the promoters of the undertaking, a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole." The writ states, that the prosecutors were willing and able to sell and convey the whole, and gave notice, and required the Company to take the whole. Now the 92d section, though it protects the owners from being obliged to sell part, does not contain any words making it obligatory on the Company, who only want a part, to take the whole, as some other acts of parliament do; and therefore the writ, which is founded entirely on such a supposed obligation on the part of the Company, manifestly cannot be sustained. This simple point decides the case for the defendants, and shews that the writ must be quashed. We have to lament the waste of time that has occurred, from the obscurity thrown about the case by the superfluous matter foisted into the record. The learned counsel for the prosecutors contended, as a last resource, that the mandamus might go for a part, though it claims the whole. This is impossible for that reason, and also because no claim has ever been made in respect of a part.

Judgment for the defendants.

COURT OF COMMON PLEAS.

Michaelmas Term, 1847.

CORDON *v.* THE UNIVERSAL GAS-LIGHT COMPANY. *Nov. 24th.*

The plaintiff having obtained judgment against a registered Joint-stock Company, in this Court, gave notice to a shareholder, pursuant to the 7 & 8 Vict. c. 110, s. 68, that application would be made to the Court *or* a judge, for leave to issue execution against him on the judgment; a summons was accordingly taken out before a Baron of the Exchequer at chambers, which was dismissed, on the ground, that, as he was not a judge of the Court in which the judgment was obtained, he had no jurisdiction.

Upon a subsequent application to the Court on the same notice:—*Held*, that the notice was exhausted by the application to the judge at chambers; and that a second application could not be made on the same notice. It was therefore dismissed, with costs.

Those costs not being paid, the plaintiff served a fresh notice of application for a *scire facias*:—*Held*, that the Court would not decline to interfere, till those costs were paid, it not appearing that the party was unable to obtain those costs. Secondly, that the plaintiff was not precluded from making a second application on the fresh notice.

The affidavits upon which the rule was obtained, stated that D. C. was a provisional director, and had signed the deed of settlement, which recited that the parties thereto had taken shares, and that no transfer by D. C. had been registered.

Held, that the affidavits sufficiently shewed that D. C. was a shareholder for the time being. *Semble*, a party who has once become a shareholder, continues so until he has complied with sect. 13, of 7 & 8 Vict. c. 110.

THIS was a rule obtained by *Phipson*, calling upon Dominique Causse to shew cause why execution should not issue against him, as a shareholder of the Universal Gas-light Company, on a judgment obtained by the plaintiff against the Company, pursuant to the 7 & 8 Vict. c. 110, ss. 66 and 68. From the affidavits it appeared that the plaintiff, having recovered a judgment against the Company, a Company duly registered under 7 & 8 Vict. c. 110, in this Court, on the 3rd of February, 1847, and being unable to obtain satisfaction out of the funds of the Company, on the 8th of February, 1848, served D. Causse with the following notice:—

"Whereas a judgment was obtained on the 3rd day of February instant, in her Majesty's Court of Common Pleas, for the sum of 110*l.* damages, and 105*l.* 19*s.* 2*d.* costs, in a certain action brought by the above-named plaintiff

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against the above-named defendants, being a Company completely registered under an Act made and passed in the 7th and 8th years of the reign of her present Majesty, intituled &c. And whereas the said plaintiff hath used due diligence to obtain satisfaction of the said judgment against the property and effects of the said Company, but there is not any property nor are there any effects of the said Company out of which the said judgment or any part thereof can be satisfied. And whereas you, Edmund Boulter, Dominique Causse, [and others,] some or one of you, were respectively shareholders or a shareholder of the said Company at the time when the contract or engagement with the above-named plaintiff, for which the said judgment was obtained, was entered into, or became shareholders or a shareholder during the time the said contract or engagement remained unexecuted or unsatisfied, or were respectively shareholders or a shareholder at the time the said judgment was obtained: Now, we do hereby give you notice, that upon the expiration of ten days from the date of the service of this notice upon you, some or one of you, or as soon after the expiration thereof as conveniently may be, a motion will be made in her Majesty's Court of Common Pleas, or an application to one of the judges thereof, for a rule or summons, calling upon you, some or one of you, to shew cause why execution should not issue against you, some or one of you, upon the same judgment, until the same shall be satisfied. Dated, &c. 1848."

Application was accordingly made to *Parke*, B., at chambers, who decided that, as a Judge of the Court of Exchequer, he had no power under the 7 & 8 Vict. c. 110, s. 68, to adjudicate upon the matter; and thereupon this rule was obtained.

Talfourd, Serjt. now shewed cause (*a*).—Independently

(*b*) Before *Wilde*, C. J., *Coltman*, J., *Maule*, J., *Cresswell*, J.

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of the objectionable form of the notice, it has already been exhausted by the application to the judge at chambers; the 68th section of the 7 & 8 Vict. c. 110 (*a*) requires ten days' notice before every motion under that section; and the plaintiff having made one motion already under that notice, he cannot make another under the same notice. [*Maule, J.*—The statute does not require a notice before applying to a judge at chambers.] Perhaps so; but the plaintiff points out the proposed application to a judge at chambers, and has so far acted upon it. The application ought to be to vary the order of the judge.

(*a*) Which enacts, "that, in the cases provided by this Act for execution on any judgment, decree, or order, in any action or suit against the Company, to be issued against the person or against the property and effects of any shareholder or former shareholder of such Company, or against the property and effects of the Company, at the suit of any shareholder or former shareholder, in satisfaction of any monies, damages, costs, and expenses paid or incurred by him as aforesaid, in any action or suit against the Company, such execution may be issued by leave of the Court or of a judge of the Court in which such judgment, decree, or order shall have been obtained, upon motion or summons for a rule to shew cause, or other motion or summons consistent with the practice of the Court, without any suggestion or scire facias in that behalf, and that it shall be lawful for such Court or judge to make absolute or discharge such rule, or allow or dismiss such motion, as the case may be, and to direct the costs of the application to be paid by either party, or to make such other order therein as to such Court or judge shall seem fit; and in such cases such form of writs of execution shall be sued out of the courts of law and equity respectively, for giving effect to the provision in that behalf aforesaid, as the judges of such courts respectively shall from time to time think fit to order; and the execution of such writs shall be enforced in like manner as writs of execution are now enforced: provided, that any order made by a judge as aforesaid may be discharged or varied by the Court, on application made thereto by either party dissatisfied with such order: provided also, that no such motion shall be made nor summons granted, for the purpose of charging any shareholder or former shareholder, until ten days' notice thereof shall have been given to the persons sought to be charged thereby."

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Phipson, contrà.—The object of the statute was, that a shareholder should have timely notice of the application, and should not be taken by surprise; if he gets sufficient notice, that object is satisfied. The 68th section directs, that execution shall issue by leave of a judge of *the Court in which the action was originally brought;* consequently, the learned Baron had no jurisdiction, the application to him was *coram non judice*, and the notice has never been acted upon. The meaning of the notice is, that application will be made to a judge, or the Court, or both.

WILDE, C. J.—The last point is decisive against this application. The Legislature has thought fit to declare, that before application shall be made to issue such an execution as this against a shareholder, on a judgment against the Company, such person should have ten days' notice, and it has given the applicant the option of going either to the Court or before a judge. This notice informs the party that an application for leave to issue execution will be made to the Court or a judge, and accordingly a summons is issued; the parties attend before a judge at chambers, and he dismisses the summons. Now, this comes before us as an original application, and not by way of appeal from the judge, and there is no notice to support it, for the only notice given has been acted upon, and its efficiency was exhausted when the application was made to the judge, and the summons was dismissed. If a new step was to be taken, a fresh notice was necessary.

COLTMAN, J.—Without giving any opinion as to whether a fresh notice may or may not be given, so as to bring a person before the Court a second time, under circumstances similar to the present, I think that this notice was exhausted by the application at chambers, and that the rule ought to be discharged.

MAULE, J., and CRESSWELL, J., concurred.

Rule discharged, with costs.

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A fresh notice having been given of an intention to move for leave to issue a scire facias, *Phipson*, in Michaelmas Term last, obtained a rule calling upon D. Causse to shew cause why execution should not issue against him, as a shareholder "for the time being" in the Company. From the affidavits it appeared that D. Causse had signed a consent, which was duly entered at the Registration-office, to act as one of the provisional committee, and to take fifty shares; that he was a party to the deed of settlement, which recited that the several parties thereto had taken shares; and that no transfer of shares by Causse had been registered. It also appeared that the costs of the former rule had not been paid.

Talfourd, Serjt., now shewed cause (*a*).—First, the costs of the former rule not having been paid, the Court, adopting the rule as to the non-payment of costs in ejectments, ought to refuse to interfere until those costs are paid: *Doe* d. *Feldon* v. *Roe* (*b*). But, secondly, this matter has been already disposed of, and the Court will not allow a second application on the same materials: *Tilt* v. *Dixon* (*c*); and the discharge of the former rule, on the ground of a want of notice, does not take the case out of the general rule: *The Queen* v. *The Manchester and Leeds Railway Company* (*d*). [*Maule*, J.—That was a case where there was a discretion in the Court: has the Court here the same discretion as in cases of certiorari?] It is submitted that they have under this Act: *Field* v. *M'Kenzie* (*e*). But it does not appear from the affidavits, that Causse was a share-

Nov. 23*rd.*

(*a*) Before *Coltman*, J., *Maule*, J., and *V. Williams*, J.
(*b*) 8 T. R. 645.
(*c*) 17 L. J., C. P., 61.
(*d*) 8 A. & E. 413.
(*e*) 4 C. B. 725; *S. C.*, 16 L. J., C. P., 203.

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holder "for the time being;" no shares were in fact ever issued, and he never attended any meeting of the committee after the 18th of August, 1846: *Scott* v. *Berkeley* (*a*).

Phipson, contrà.—As to the non-payment of the former costs, the rule cited applies only to ejectments, and the Court will not extend that rule: *Doe* d. *Blackburn* v. *Standish* (*b*). This is a different application to the former one, and made on a different state of facts; the former application was dismissed on a technical objection, and not upon the merits. The result of the former application is equivalent to a nonsuit, and the effect is the same as to Causse being a shareholder. He signed the deed reciting that he was so, and there is no doubt that he was a shareholder at one time; then he continues a shareholder until a transfer of his shares has been registered under the 13th section.

COLTMAN, J.—The first question in this case is, whether this rule should not be postponed until the costs of the former application have been paid. It appears that the party has got an order for the costs, which he can enforce, and it does not appear that there is any inability to pay the amount. I think, therefore, that there are no sufficient grounds for staying the proceedings. As to whether the party is a shareholder, I think there is no question at all. The 3rd section of the statute says, that every person who is entitled to a share, and has executed the deed of settlement, is a shareholder, and, once a shareholder, he continues so until he has complied with the provisions of the 13th section; it seems to me, therefore, that he is a shareholder. The more important question on this rule is, whether, the former application having been made, and substantially the same matter having been then brought before the Court, we ought now to entertain the second application. If the question on the former occasion had been, whether

(*a*) Ante, p. 51; *S. C.*, 16 J. L., C. P., 107.
(*b*) 2 Dowl. N. S. 26.

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he was a shareholder or not, and the applicant had failed on that ground, then the Court would not allow a second application; but it appears that the facts now presented were in truth never before the Court on the former occasion, but the plaintiff failed on the ground that he had given no sufficient notice. Subsequently the plaintiff has given a proper notice, and without doing violence to any rule of practice, we may say that he is entitled to be heard a second time. This being so, and he being a shareholder, I think this rule ought to be made absolute.

MAULE, J.—I am of the same opinion: on the former occasion all the facts were not before the Court. The Court then held, that the applicant was not entitled to his rule, on the ground of a want of notice to Causse. There was not then before the Court the same state of facts as there is now, and it cannot be said that the plaintiff has had an opportunity of bringing before the Court what he does now, and did not. If on the former occasion there were the same state of things as there are now, then the Court would say, "We have already decided the same thing between the same parties;" and if on a second application a different state of things were stated, which might have been brought forward on a previous occasion, the Court would not allow it, but would say, "You must suffer for your own error." This is like the case of an application made by an administrator who fails on the ground that he has not got letters of administration, and having obtained letters of administration, he makes a second application. I therefore think that the objection, that the same application has been already disposed of, cannot prevail, and that the rule ought to be absolute (*a*).

V. WILLIAMS, J., concurred.

Rule absolute.

(*a*) See on this point *Dodgson* v. *Scott*, ante, p. 654.

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EXCHEQUER CHAMBER.

In Error.

Dec. 2nd.

NEVINS and Another *v.* HENDERSON and Another.

In an action of assumpsit by surveyors, for work and labour, against two of the provisional committee of a proposed Railway Company, the Judge directed the jury, that, before they found a verdict for the plaintiffs, they must be satisfied that the defendants did themselves personally, or by their agent at the time actually authorised in that behalf, employ the plaintiffs to do the work, or that some other person not authorised, but assuming to act for them, the defendants, as their agent, had employed the plaintiffs, and that the defendants had afterwards been informed of, and had ratified such retainer: —*Held*, that such direction was correct.

ASSUMPSIT for work, labour, and materials, money paid, and on the account stated. Plea by the defendant Henderson, the general issue. The defendant Boustead pleaded the general issue and payment. Upon these pleas issue was joined.

At the trial, before *Rolfe*, B., at the Spring Assizes for the county of Lancaster, 15th February, 1847, it appeared that the plaintiffs were, on the 11th of October, 1845, employed as surveyors, to survey a certain line of railway, projected by persons who proposed to form a Company for the purpose of making a certain railway to be called the Lancaster and Newcastle-upon-Tyne Railway, and that the action was brought to recover the sum of 128*l.* 14*s.*, being the value of the work, &c. of the plaintiffs, in and about making the said survey of the line. In order to shew that the defendants were liable, the plaintiffs proved, that several members of the provisional committee of the Company from time to time gave directions touching the survey, and touching such matters as were requisite to carry on the business and attain the objects of the Company; and that the defendant John Boustead on several occasions made suggestions to members of the provisional committee, as to the most desirable line for the said railway, and on one of such occasions, after consenting to become, and when he was such provisional committee-man of the Company, suggested to Mr. Thomas Wearing, who was also a member of the said committee, that an alteration should be made in

the line originally proposed to be surveyed, and such suggestion was communicated to the plaintiffs by Mr. Wearing, and acted upon by them. That, upon the 8th day of October, 1845, the defendant John Boustead consented to be and became a member of the said provisional committee; and on the 18th day of the same month, the defendant William Henderson consented to be a member of the said committee.

The learned Judge directed the jury that they must be satisfied, in order to find a verdict for the plaintiffs on the first issue, either that the defendants did themselves personally, or by their agent at the time actually authorised in that behalf, employ the plaintiffs to do the work for which the action was brought, or that some other person not authorised, but assuming to act for them as their agent, had retained and employed the plaintiffs, and that the defendants had afterwards been informed of, and had ratified and confirmed such retainer and employment.

The jury found a verdict for the defendants.

To this ruling the plaintiffs excepted.

Pashley for the plaintiffs, in support of the exceptions (*a*). —The definition of the learned judge, of the only *possible* conditions of the defendants' liability, was erroneous. In cases of partnership, or of quasi partnership, the parties may so demean themselves as to incur liability to be sued in an action of assumpsit: *Goode and Another* v. *Harrison* (*b*) is an instance. There an *infant* partner of J. S., who, when infant, could give no authority to J. S. to make a contract for him, was held liable to an action for goods supplied to J. S., on the credit of the partnership, after the infant had attained his full age, although the infant had done no single act, after he came of age, to ratify the partnership. Here the defend-

(*a*) Before *Patteson*, *Coleridge*, *Maule*, *Wightman*, *Cresswell*, *Erle*, and *V. Williams*, Js.

(*b*) 5 B. & Ald. 147.

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ants at least stand by, as the infant did in *Goode* v. *Harrison*, and allow the plaintiffs to do the work on the faith and credit of the provisional committeeship of the defendants; and the evidence (which is only material on this record, as enabling the Court to apply and understand the learned Baron's direction) is sufficiently set out to shew, that one at least of the defendants was extremely active in directing the performance and varying the subject of the work done by the plaintiffs. The jury ought to have been told that the defendants would be liable, if they had so held themselves out to the plaintiffs as to induce them to *suppose* that they were partners in the concern of the provisional committeeship. The work, also, of the plaintiffs is making surveys which were of absolute necessity to the carrying out the object of the association. Such a holding out is sufficient to prevent a defendant from saying, that he did not make the contract which the plaintiff had reasonable ground for supposing him to have made: *Young* v. *Axtell*(*a*).

The true principle of such actions, founded, as it were, on a quasi contract only, is explained by *Tindal*, C. J., in *Fox* v. *Clifton*(*b*):—"The holding oneself out to the world as a partner, as contradistinguished from the actual relation of partnership, imports at least the voluntary act of the partner so holding himself out. It implies the lending of his name to the partnership, and is altogether incompatible with the want of knowledge that his name has been so used. Thus, in the ordinary instance of its occurrence, where a person allows his name to remain in a firm, either exposed to the public over a shop-door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, the knowledge of the party that his name

(*a*) Cited in *Waugh* v. *Carver* 2 H. Bl. 242.
(*b*) 6 Bing. 776, 794.

is used, and his assent thereto, is the very ground upon which he is estopped from disputing his liability as a partner." The true principle is also stated in *Vere* v. *Ashby* (*a*), by *Littledale*, J., who observes: "If a person be a partner, or, with his assent, be held out to others *as a partner*, he is liable." In the case of *Davison* v. *Robertson* (*b*), in the House of Lords, one of the interlocutors laid down an erroneous rule on a kindred question of agency, viz.: "An indorsation per procuration requires a special mandate;" and, in commenting on this rule so laid down, Lord *Eldon* stated (*c*), "that no such thing was absolutely necessary; for if, from the general nature of the acts permitted to be done, the law would infer an authority, the law would say, that such an authority might exist without a special mandate, and that an indorsement by procuration might be good, though there were no such mandate." Lord *Eldon*, in the same place, alludes to a case of *Fleming* v. *M'Nair*, in Dom. Proc. 1812, which case, as stated by him, decided, that where the business of half a dozen different firms was carried on under the same general name, unless they could fix the man who held any of their bills with the knowledge that it was the bill of A. & Co., or any other of the separate firms, he had got paper which gave him recourse upon them all. There there was neither actual contract nor ratification, within the learned Judge's definition. And though the cases referred to were cases of *partnership*, a similar rule has been applied in cases not of partnership. A surety's right to contribution from his co-surety is expressly held to be founded, not in contract, but on equity and good conscience. [*Maule*, J.—I believe that has been stated by two *Lord Chancellors*.] It was first distinctly laid down by the Court of Exchequer in equity, *Deering* v. *The Earl of Winchilsea* (*d*), that, "If a view is

(*a*) 10 B. & C. 297.
(*b*) 3 Dow, 218.
(*c*) Page 229.
(*d*) 2 B. & P. 270, 272.

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taken of the cases, it will appear that the bottom of contribution is a fixed principle of justice, and is not founded on contract." Lord Chancellor *Eldon* says, in *Craythorne* v. *Swinburne* (*a*), the surety's right to contribution "is properly enough stated as depending rather upon a principle of equity than upon contract; unless, in this sense, that, the principle of equity being in its operation established, a contract may be inferred upon the implied knowledge of that principle by all persons; and it must be upon such a ground of implied assumpsit, that, in modern times, Courts of law have assumed a jurisdiction upon this subject." Lord *Redesdale*, in *Stirling* v. *Forrester* (*b*), says expressly: "The right and duty of contribution is founded on doctrines of equity: it does not depend upon contract." The cases of *average*, in the law maritime, and of an acceptor for the honour of any party to a bill of exchange, are instances of a similar right of action, where there is no actual contract. Thus, a party may waive a tort, and sue for money had and received, instead of suing in trespass or trover; and this, surely, is allowed more ex æquo et bono than on any sort of contract. In effect, the law says, that a contract shall be *implied* (though, in truth, there never was one) in such cases as have been mentioned. In fictione juris consistit æquitas; and the law is compelled to resort to such fiction, when the "principle of justice" makes it necessary.

Moreover, the defendants would be liable although the agent supposed in the learned Baron's direction had not at all assumed or professed to act for the defendants, if, in truth, he was so acting, or if, acting for the concern of which they were members, they afterwards also adopted what he had done. Even in the case of trespass, if the trespass be done to a man's use or for his benefit, his agreement subsequent amounts to commandment; for, in

(*a*) 14 Ves. 160, 164. (*b*) 3 Bligh, 575, 590.

that case, "omnis ratihabitio retrotrahitur et mandato æquiparatur" (*a*). The passage is cited with approbation by *Park*, J., in *Wilson* v. *Barker* (*b*). Where a stranger commits a trespass, he is not allowed afterwards to divest himself of his liability, by setting up that it was done in a particular character not set up at the time (*c*). *Wilson* v. *Tumman* (*d*) shews that an actual trespasser cannot protect himself against an action for tort, because another person, (who might have authorised), after his committing it, assents. Clearly a right of action for a tort could not be taken away from a person when the grievance had once accrued. And as the tort-feasor, in such case, is for ever responsible, it is held that a mere assent of another to such a tort, done in a specific character inconsistent with that of being an agent, does not make such other liable: *Wilson* v. *Tumman*. In the next place, *Rolfe*, B., dealt with the case as if it was within the facts of *Wild* v. *Hopkins* (*e*); but, in truth, this is one of the cases which, according to the language of the judgment in that case "does not assume so simple a form;" for here we have a provisional committee list published, known to the defendants, and the names of the plaintiffs themselves in that list as surveyors. Lastly, the provisional committee constitute an association, the object of which is, by means of an Act of Parliament, to establish a great commercial company; and a man's permitting his name to be used as one of such a society, will, no doubt, make him liable to any one who does work for the Company: Pothier de Société, n. 98 (*f*), and Azuni's Dictionary of

(*a*) 4 Inst. 317.
(*b*) 4 B. & Ad. 616.
(*c*) See Com. Dig. "Trespass," (C. 1); Bac. Abr. "Trespass," (G.); Godbolt, 109.
(*d*) 6 M. & G. 237.
(*e*) Ante, Vol. 4, p. 351, 369.
(*f*) "Pour que l'un des associés ait ce pouvoir, il faut, ou que des associés lui aient donné expressement ou tacitement le pouvoir, d'administrer les affaires de la so-

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Mercantile Jurisprudence, under the word "Società, sect. 12(*a*).

Manisty (with whom was *Compton*), appeared to support the ruling of the learned Baron, but was not called upon.

PATTESON, J.—This case arises on a bill of exceptions, and we cannot travel out of it. We are all unanimously of opinion that the direction of the learned Judge was right; and that it is not possible the defendants should be liable in this action, except in one of the three ways in which the learned Judge put it to the jury, namely, that, before they found a verdict for the defendants, they must be satisfied that the defendants did themselves personally, or by their agent at the time actually authorised in that behalf, employ the plaintiffs to do the work, or that some other person not authorised, but assuming to act for them, the defendants, as their agent, had employed the plaintiffs, and that the defendants had afterwards been informed of and had ratified such retainer. We are, therefore, of opinion that there must be

Judgment for the defendants.

ciété, *ou que celui qui a contracté avec lui ait eu sujet de croire qu'il avait ce pouvoir.*"

(*a*) "La scienza ed acquiescenza d'un negoziante che si spende il di lui nome in una società de commercio, basta per renderlo obbligato verso i creditori della medesima giacché si considera avessi seguita la fede del di lui nome; lo che è conforme ai principii della ragione comune, alle massime de' nostri magistrati ed alla dottrina universale."

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IN CHANCERY.

BEFORE THE VICE-CHANCELLOR OF ENGLAND AND THE LORD CHANCELLOR.

THE STOCKTON AND HARTLEPOOL RAILWAY COMPANY *v.* THE LEEDS AND THIRSK and THE CLARENCE RAILWAY COMPANIES. *Aug. 4th & 5th.*

THE bill in this case was filed by the Stockton Railway Company, praying an injunction to restrain the Leeds Railway Company from opposing a bill then before the House of Lords, which had been presented to Parliament by the Clarence Company, for the amalgamation of that Company with the Leeds Company, or doing anything to prevent the bill from passing into an Act; and it also prayed the specific performance of an agreement, whereby (as it was alleged) the Leeds Company had agreed to purchase the Stockton Company.

The facts were as follow:—Under a power conferred by an Act of Parliament passed in 1844, the Clarence Railway Company leased their line to the Stockton Company, reserving to themselves the right of purchasing the Stockton line at the end or sooner determination of the term, upon certain conditions.

In 1846 an Act of Parliament was passed to enable the Leeds Company to purchase the Stockton Railway, and

A Court of equity has jurisdiction, if a proper case connected with private property or interest be made, to restrain a party by injunction from petitioning against a bill in Parliament.

The Stockton Railway Company being leased to the Clarence Company, entered into an agreement for the sale of their railway to the Leeds Company, and it was a term of the agreement, that the purchase should be completed three weeks after an Act had passed for permitting the Leeds to amalgamate with the Clarence Railway Company.

It did not appear that any definite agreement was concluded between the Clarence and the Leeds Company, but it was understood that a bill should be presented by the Clarence Company for the amalgamation of the two Companies. The bill was presented and passed the Commons without opposition, but in the Lords the Leeds Company presented a petition against the bill.

The Stockton Company, fearing that if this Act did not pass, they would lose the benefit of their contract, filed a bill against the two other Companies, praying an injunction to restrain the Leeds Company from opposing the bill in Parliament, and also specific performance of the agreement.

Held, by the *Lord Chancellor*, discharging the order of the *Vice-Chancellor of England* granting the injunction, that the Stockton Company had not made out such a case as to induce a Court of equity to exercise its jurisdiction by injunction.

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negotiations were afterwards entered into by the directors of both Companies for that purpose; before, however, any agreement was finally settled, the directors of the Leeds Company, seeing that the interests of the Clarence Company were much involved with those of the Stockton Company, proposed, with the sanction of the shareholders, to purchase the Clarence Railway also, and it was arranged that the Clarence Company should bring a bill into Parliament for the purpose of amalgamating the Leeds with the Clarence Company.

On the 13th of January, 1847, an agreement, sanctioned by the shareholders of each Company, was finally concluded between the Leeds and the Stockton Company, a term of which was, that the purchase should be completed within three weeks after the bill for the power of amalgamating the Leeds Company with the Clarence Company had passed into an Act. And it was further agreed, that the directors of the Stockton Company should endeavour to promote the passing of the Act.

The Clarence Company brought their bill into Parliament accordingly, and the same passed the House of Commons; but in consequence of some disagreement between the directors of the Clarence and the Leeds Companies, the latter Company determined to oppose the bill in the House of Lords, and presented a petition for that purpose; whereupon the Stockton Company filed their present bill, alleging that the ground of the opposition to the bill was to prevent or delay the completion of the agreement entered into with them, and which, by the provisions of the agreement, was only to take effect three weeks after the passing of the Act, which the Leeds Company were now fraudulently opposing.

The Leeds Company denied that any definitive agreement had been entered into by them, with the Clarence Company, for the purchase of their line, or for the promotion of the bill in Parliament, except on certain conditions; and

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they alleged that they were not aware of the existing lease of the Clarence Railway to the Stockton Company, at the time they assented to the bill.

The *Vice-Chancellor* having granted an ex parte injunction in the terms of the prayer of the bill, the defendants now moved to dissolve it.

The VICE-CHANCELLOR.—It strikes me that it would be quite absurd for any Court to attempt to say that an application shall not be made to the Legislature, generally; because we well know that the subjects of this country are always protected by the Legislature; nor can it be assumed that the Legislature will do anything at all improper; but that is not the present question. The present question is, whether, if a particular individual has come under a contract that he will not oppose a bill, there is not authority in this Court to enforce that contract, that is, by injunction to prevent him from opposing that bill. Now, after the case of *Lord Petre* (*a*), and after another case which followed it (*b*), there can be no doubt but that this Court will give effect to contracts that are made between private persons, with regard to their conduct as to bills pending in Parliament; and in the case of *Lord Petre*, this Court thought proper to enforce the contract which had been made between him and the Company, that, if he would withdraw his opposition to the bill, then they would, over and besides the price they were to pay for the land, give him a large sum, and it recognised the propriety of making such a contract as, in that case, was actually made. That case came under the cognizance of the present *Lord Chancellor*, and he supported the principle; and in a subsequent stage of the case I acted upon it.

The only question is this, whether, from the very nature

(*a*) Ante, Vol. 1, p. 462.

(*b*) Vide *Simpson* v. *Lord Howden*, Ante, vol. 3, p. 94.

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of this agreement of the 13th of January, 1847, it is not manifest that a contract has virtually been entered into by the Leeds Company with the Stockton Company, that they will not oppose the passing of the bill. The contract is made between the Leeds Railway Company and the Stockton Railway Company, for the purchase, in effect, on certain terms, by the Leeds Railway Company, of the Stockton Railway, and the fifth stipulation provided that the purchase should be completed under certain conditions.

Now, it is undeniable that this agreement was made with reference to the supposition, on both sides, that there would be a bill brought into Parliament in order to enable the Clarence Company to dispose of its Railway to the Leeds Company; and it is observable that this very clause, which stipulates that the purchase is to be made within three months from a given time, is an allusion to the bill, and imposes on the Stockton Company an obligation from which they cannot free themselves, until this agreement is either accomplished or put an end to by the passing or rejection of the bill.

Well, the parties have thought proper to stipulate, as the time for the completion, three calendar months from the passing of the Act. It seems to me that it necessarily follows, that if that is to be the period for the completion, by the choice of both parties, neither one of them is at liberty to say that that time never shall happen. Although it does not impose any obligation on the Leeds Company to promote the Act, it seems to me to imply an obligation by them not to oppose it. That is the sole point, and I cannot but think that, finding the agreement in this form, I should be departing from the established rules of the Court in matters of this kind, if I were not to uphold the injunction; and I conclude that the House of Lords will have ample means of information from other sources than merely the representation of the Leeds Company, as to what is proper to be done between all parties concerned. It appears

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to me to be a new mode of carrying out justice, and to be acting, in fact, on the supposition that the House of Lords will not do justice, for the defendant to say, "My case is in so much jeopardy, that I will do all I can to oppose the bill rather than leave it to the House of Lords and the House of Commons jointly to determine what is right to be done." I view it, therefore, merely as a stipulation for valuable consideration on the part of the Leeds Company, that they will not oppose the bill; and that is, as it appears to me, the sole point; and I have not the slightest doubt that the Legislature will do justice between the parties, and I therefore refuse the application, with costs.

The defendants now moved, by way of appeal to the *Lord Chancellor*, to discharge the order of the *Vice-Chancellor of England.*

The *Solicitor-General*, Mr *Walker*, and Mr. *G. L. Russell*, in support of the motion.—There is no term of the agreement entered into between the different Companies, as to promoting or opposing the bill in Parliament, which can be the subject of a decree for specific performance in this Court: *Clowes* v. *Higginson* (*a*); but the plaintiffs were not parties to that agreement, and cannot suffer any injury even if the Act do not pass; for if a term of an agreement be nullified by the act of either party, the Court will read the agreement as if that term were struck out. All those cases in which this Court granted injunctions against individuals were different from this, inasmuch as they had contracted away their private right; but in this case no such contract existed, and the right to petition Parliament in opposition to a bill in Parliament remained unaffected.

(*a*) 1 V. & B. 524.

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Mr. *Bethell* and Mr. *W. V. Prior*, contrà.—The bill in this case is merely permissive, and contains no compulsory clauses; and the Leeds Company can only oppose it for a purpose which this Court will endeavour to defeat. The injunction is necessary in order to enforce the agreement against the Leeds Company; for if no injunction were granted or no Act passed, then a Court, on bill filed for the specific performance of the agreement, would say, that the circumstances on which the agreement rested had not arisen. The petition in this case was presented against the preamble of the bill, shewing that the sole object was to defeat the agreement.

The *Lord Chancellor* refused to hear Mr. *Stuart* and Mr. *Lonsdale*, who appeared for the Clarence Company.

The *Solicitor-General* replied.

The LORD CHANCELLOR.—In this case, which is an application to restrain a party from petitioning against a railway bill pending in Parliament, I have much satisfaction in finding (and it is no more than what I expected from the learned counsel who argued this case on behalf of the defendants) that no question has been raised here as to the jurisdiction of the Court to interfere in a case of this kind, if a proper case be made. There is no question whatever about the jurisdiction. A party who comes to oppose a railway bill in Parliament, does so solely in respect of his private interest, not as representing any interest of the public, or for the purpose of communicating any information to Parliament. He is not even allowed to be heard as a petitioner against the bill, unless he has a locus standi in respect of some property or interest liable to be affected by it if it should pass into a law. This Court, therefore, if it sees a proper case connected with private property or in-

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terest, has just the same jurisdiction to restrain a party from petitioning against a bill in Parliament, as if he were bringing an action at law, or asserting any other right connected with the enjoyment of the property or interest which he claims. About that there can be no question whatever; nor could any doubt be raised about it, except by the same confusion of ideas which gave rise to the old discussion between Courts of law and equity, which has been so long set at rest, and which was founded upon the supposition that the injunction operated upon the Court and not on the party.

Having, therefore, no doubt as to the jurisdiction, I proceed to inquire whether a proper case is here made for its exercise. Now, the whole is founded on the agreement of the 13th of January, 1847; but it is to be observed, that that agreement contains no contract on the part of the Leeds Railway Company with the Stockton Railway Company respecting the purchase of the Clarence Railway. The Stockton Railway Company, indeed, by that agreement, contract to promote the completion, by the Clarence Railway Company, of the sale of that railway to the Leeds Railway Company, but there is no contract on the part of the Leeds Railway Company to do anything with respect to the contract between the Stockton and the Clarence Railway Companies. The bill, however, is not put upon the ground of contract, but on the ground of fraud, which is said to consist in this, that the Leeds Railway Company, having concluded their contract for the Clarence Railway, but which required an Act of Parliament to give it effect, and having purchased the Stockton Railway, under an agreement that such purchase should be completed within three weeks after the passing of the Act for the purchase of the Clarence Railway, are opposing that Act, in order to deprive the plaintiffs of the benefit of that provision in their contract. But in order to found an equity upon these circumstances, they must prove that the Clarence Railway

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Company are entitled to have that Act passed; for, if they are not, it follows that those against whom it is to be passed in Parliament, have a right to resist it, and there can be no fraud, therefore, in opposing it. But it appears to me to have been very clearly established, that the Clarence Company are not so entitled, for the evidence shews, first, that the Act was to be only consequential upon the agreement, when its terms should be definitively concluded; and secondly, that no such agreement has yet been concluded. With respect to the latter of these propositions, indeed, the bill charges that it is immaterial; and that, even supposing no such contract to have been concluded, the plaintiffs are entitled to the injunction. But I am of opinion that there is no foundation whatever for that charge, for if there were no concluded contract, but only an intended contract, there could be no violation of duty in resisting the bill, which was only to give effect to such intended contract. On the contrary, the attempt to pass the bill under such circumstances, for any collateral purpose, would be a violation of duty on the part of the Clarence Railway Company, and would justify the Leeds Company in opposing it. In that case, therefore, the injunction would operate, not to prevent, but to facilitate a violation of equity and duty. I am of opinion, therefore, as the Clarence Company had no right, as the matter stands, as against the Leeds Railway Company, to press anything which is for the purpose of completing this contract, no such contract in fact having been finally agreed upon, that the Stockton Railway Company, acting as they evidently are, in connexion,—I should rather say in collusion,—with the Clarence Railway Company, have no such right, as against the Leeds and Thirsk Railway Company; and consequently that the injunction must be discharged; and that the application for the injunction before the *Vice-Chancellor* ought to have been refused, with costs.

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BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

Ex parte The ARCHBISHOP of CANTERBURY, *Re* The EAST LINCOLNSHIRE RAILWAY COMPANY'S ACTS. *June 30th.*

In order to avoid future applications to the Court, an order made on petition, for payment of dividends arising from purchase-money of land attached to the archbishopric of Canterbury, and taken by a Railway Company, to the archbishop for the time being. The Company ordered to pay the costs of the petition.

THIS was a petition presented by the Archbishop of Canterbury, and it prayed that the dividends of a sum of money which had been paid into Court, and invested in respect of the purchase of lands attached to the Archbishopric of Canterbury, which had been taken under the powers of their Act, by the above-named Company, "may be paid to the present Archbishop, so long as he shall continue Archbishop of Canterbury, and afterwards to the Archbishop of Canterbury for the time being." It also prayed the taxation of the costs of the application, and that the costs so taxed might be paid by the Company.

It appeared by the petition, that, during the life of the late Archbishop, orders had been made by the Court for the payment of one part of the dividends in question to the Archbishop, so long as he should continue Archbishop, or until further order; and, as to another part, for payment of the dividends to the Archbishop, during his life, or so long as he should continue Archbishop.

Mr. *Cockerell*, for the petitioner.

Mr. *Osborne*, on behalf of the Company, submitted, that the Company ought not to be obliged to bear the costs of the present application, which was, in fact, the consequence of the neglect of the petitioner, in not taking a sufficient order in the first instance.

Mr. *Cockerell*, in reply, said, that it had not been the custom of the Court to make a prospective order for the payment of dividends; but that it was extremely desirable that such an order as that sought should be adopted in cases where the dividends were payable to an individual, as re-

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presentative of a public office. That the present application was, in fact, a boon to the Company, which would have had to pay the costs of the petition, if it had prayed the payment of the dividends to the Archbishop *durante officio* only.

The VICE-CHANCELLOR made the order as prayed, observing, that, as the present order would prevent the necessity of any future application to the Court, the Company ought to pay the costs.

BEFORE THE VICE-CHANCELLOR OF ENGLAND.

June 29th.

Ex parte SLATERS, Devisees, *Re* THE NORTH MIDLAND RAILWAY ACT.

Under the provisions of the North Midland Railway Act, the Company must pay the costs of the parties applying for payment out of court of a sum of money which had been paid in for land taken by the Company, and invested.

BY a will, lands were settled on the mother for life, with remainder to her children, then infants, in fee.

The lands were taken by the North Midland Railway Company, under the powers of their Act (6 & 7 Will 4, c. cvii), and the purchase-money paid into the Bank, and afterwards invested in Consols.

A petition was now presented for the sale and payment out of court to the mother and her children, now of age, of the sum invested, and it also prayed the costs.

Mr. *Speed* appeared in support of the petition.

Mr. *B. L. Chapman* contended, that, under the terms of their Act, the Company were not liable for the costs of the payment of the money out of court, if the parties entitled elected to take it in specie; and that the 45th and 52nd sections (*a*) only gave the costs in cases where the money was applied in the particular manner prescribed by the Act.

(*a*) The 45th section enacts, that if any money shall be agreed or awarded to be paid for the purchase of any lands to be taken or used, which any corporation, tenant for life or in tail, or &c., or any person under any other legal disability or incapa-

The VICE-CHANCELLOR.—I would rather, if I can, put a large construction on the words of an Act of Parliament, when, by so doing, I can do what I conceive to be justice, than interpret them so strictly as, in my opinion, to permit the Company to do an injustice. I think, in this case, the words of the Act are quite large enough to enable me to decide that the Company must pay the costs of the payment out of court.

city shall be entitled unto or interested in, such money shall, in case it amount to 200*l.*, be paid into the Bank of England, &c., "and shall, when so paid in, there remain, until the same shall, by order of the said Court, made in a summary way upon petition to be presented to the said Court by the party who would have been entitled to the rents and profits of the said lands, be applied either in the purchase or redemption of the land tax, or in or towards the discharge of any debt or other incumbrance affecting the said lands or affecting other lands standing settled therewith, to the same or the like uses, trusts, intents, or purposes as the said Court of Exchequer shall authorise to be purchased or paid, or such part thereof as shall be necessary, or until the same shall, upon the like application, be laid out by order of the said Court, made in a summary way as aforesaid, in the purchase of other lands, which shall be settled to the like uses," &c.

Sect. 52 enacts, "that where, by reason of any disability or incapacity of any party entitled to any lands to be taken or used, or in respect of which any satisfaction, recompense, or compensation shall be payable under the authority of this act, the purchase-money for the same, or the money paid for such compensation, shall be required to be paid into the Bank of England, it shall be lawful for the said Court to order the costs, charges, and expenses attending the purchase or the taking or using of such lands, or which may be incurred in consequence thereof, and also the costs, charges, and expenses of any proceedings had as hereinbefore authorised for the investment of such purchase or compensation money in government or real securities, and for the payment of the interest and dividends thereof out of court, or so much of such costs, charges, and expenses as the said Court shall think reasonable, together with the necessary costs and charges of obtaining the proper orders for such purposes, to be paid by the said Company out of the monies to be received by virtue of this Act; and the said Company shall from time to time pay such sums of money for such costs, charges, and expenses as the said Court shall direct."

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BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

Nov. 17*th.*

Re THE BUCKINGHAMSHIRE RAILWAYS, *Ex parte* THE CHURCH WARDENS AND OVERSEERS OF BICESTER.

In order to obviate the necessity of repeated applications to the Court in cases where the purchase-monies of glebe lands had been paid into Court and invested, the form of the order was, that the dividends should be paid to the vicar for the time being, and churchwardens and overseers, or either of them.

THIS was a petition presented by the churchwardens and overseers of the poor of Bicester, and it prayed the investment of a sum of money which had been paid into court by the above-named Companies for the purchase of certain lands taken by them under the powers of their Act; and it further prayed, that the dividends of the sum of stock so to be purchased might from time to time be paid to the petitioners (the churchwardens nominating) and their successors, churchwardens and overseers of the poor of the said parish of Bicester, upon the trusts declared by a certain indenture in the petition set forth.

Mr. *Rasch*, for the petitioners.

Mr. *Speed*, for the Company.

The VICE-CHANCELLOR made the order for investment as prayed, but, at the request of counsel, ordered that the interest to accrue on the Bank Annuities, when purchased, be from time to time, as and when the same should become due, paid to J. W., clerk, the present vicar of the parish of Bicester, or to the vicar of the said parish and the churchwardens and overseers of the poor of the said township for the time being, or either of them; and in case the same should be received by the vicar, he was directed, on the receipt thereof, to pay the same over to the churchwardens and overseers for the time being of the said township.

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BEFORE THE VICE-CHANCELLOR OF ENGLAND AND THE LORD CHANCELLOR.

July 18*th* & 19*th*.
Nov. 9*th* & 10*th*.

THE SOUTH WESTERN RAILWAY COMPANY *v.* COWARD.

A Railway Company under the powers of their Act gave notice to the lessees of a factory and buildings, that they required a part of their premises. The lessee thereupon gave a counter-notice, requiring the Company, under the 92nd section of the Lands Clauses Act, to take the whole. The Company took no further proceedings until the lease of the premises had expired. The lessees having remained in possession of the premises, the Railway Company, without serving any new notice on the defendants, had the value of their interest in the whole of the premises assessed, deposited the amount in Court, delivered a bond, and entered into possession of a part of the premises under the 85th section.

The defendants conceiving that the Company had no right to proceed under the 85th section, sent in a claim, and gave them notice to issue their warrant to the sheriff, to summon a jury to assess compensation under the 68th section.

The Company thereupon filed their bill to restrain such proceedings.

Negotiations had been entered into by the reversioners with the Company and with the defendants, which rendered it doubtful to what interest in the premises the latter was entitled.

On motion to dissolve an injunction granted ex parte:—*Held*, by the Lord Chancellor, affirming the decision of the Vice-Chancellor of England, that the injunction to restrain proceedings by the defendants under the 68th section be continued, until the rights of the several parties had been ascertained.

THE bill in this case was filed on the 8th June, 1848, and it prayed that an alleged agreement, arrangement, or understanding of the 5th January, 1848, and every other agreement or arrangement whatever relating to the tenancy or occupation of the lands and premises of the defendants, made with them by any other persons than the plaintiffs, without their knowledge or consent, after the date of their notices to treat, might be declared invalid and inoperative against plaintiffs, in respect of the premises mentioned in their notices; and also that the defendants might be restrained from commencing or instituting any action at law or other proceedings under or pursuant to the provisions of the 68th section of the Lands Clauses Consolidation Act, or otherwise, for settling or recovering the amount of compensation money claimed or demanded by them; and from taking any proceedings under their notice or under the said Act or otherwise, to obtain or have an apportionment of rent, with reference to the lands purchased by the plaintiffs. The facts were as follow:—

Thomas Lett and others were the owners of a certain starch manufactory and premises, in Princes-street, Lambeth, of which the defendants were the lessees, for a term

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of fourteen years, commencing from the 24th of June, 1833.

Part of the yard and premises attached to the manufactory, and scheduled in the South Western Railway Metropolitan Extensions Act, being required by the Company for the purpose of constructing their line, they served a notice on the owners and on the defendants, dated the 14th May, 1846, requiring the land and premises mentioned in the schedule thereto, and informing the defendants that they were ready to treat for the purchase of such lands, and for the compensation to be made for damage to be sustained by them in consequence of the making of the railway.

Within twenty-one days of the service of the last-mentioned notice, the defendants delivered to the Company a counter notice, claiming 8000*l.* for the purchase of their estate and interest in the whole of the factory and premises, and the further sum of 35,000*l.* for compensation for damage, and requiring the Company, in the event of non-compliance, to nominate a special jury for the purpose of settling the question of compensation, according to the provisions of the Lands Clauses and the Railway Clauses Consolidation Acts.

The bill alleged that the whole interest of the defendants in the premises required to be purchased by the Company, consisted of a lease therein, at rents amounting to 500*l.* per annum for the residue of a term of fourteen years, which would expire by effluxion of time on the 24th June, 1847, being only one year and three weeks from the date of the Company's notice. That, in fact, the only buildings used or occupied by the defendants in the manufacture of starch, were the building and factory, covering an area of 29,900 feet, whereof the Company only required 7960 feet, and that the rest of the premises required by the Company consisted of a garden and piggeries, then wholly unused; that the Company, considering the claim of the defendants exorbitant and unreasonable, and inconsistent

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with the 92nd section of the Lands Clauses Consolidation Act (*a*), declined to assent thereto, and resolved, rather than consent to such claim, to allow the defendants to remain in undisturbed possession of the premises during all the remainder of their term.

The defendants by their answer alleged that the whole of the premises were used by them in the manufacture of starch, and that it could not be carried on profitably if any part of the premises were taken. The defendants, after the delivery of their claim, urged the Company to complete their contract, and required them, on their declining to do so, to issue a mandate for summoning a special jury.

That, in consequence of the Company declining to assent to the defendants' claim, and neglecting to take any steps to ascertain the amount payable to them for purchase-money and compensation, they, in Michaelmas Term, 1846, applied to the Court of Queen's Bench for a writ of mandamus against the plaintiffs, which writ was, after various delays interposed by the Company, granted to the defendants on the 21st of January, 1847.

The Company made their return to the writ, whereby they stated, among other things, that, upon the delivery of the counter-claim by the defendants, the plaintiffs wholly abandoned and gave up all intention of purchasing the estate and interest of the defendants in the premises, and that the defendants had ever since been in the peaceable and undisturbed possession of the whole of the premises; and would so remain, until the expiration of their estate and interest therein, for which reason they had not summoned a jury. The Company also demurred to the writ, and the plaintiffs having pleaded thereto, the record came on to be argued before the Court of Queen's Bench on the 19th and 22nd January, 1848; but before any judgment

(*a*) Sect. 92 enacts, "that no party shall at any time be required to sell or convey to the promoters of the undertaking, a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof."

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was delivered, the lease of the 24th June, 1833, in the premises expired (*a*).

In the meantime the Company entered into negotiations with Thomas Lett and the other owners of the premises, for the purchase of their reversionary interest, and after many communications an agreement, bearing date the 3rd August, 1847, was entered into between the owners and the Company, whereby it was agreed, amongst other things, that the Company should be at liberty to pull down buildings and erect arches, &c., on such part of said premises as they should find necessary; and it was further agreed, that on the Company fulfilling certain terms of the said agreement, they should "have possession of the property so far as the parties can give the same, Messrs. Coward & Co.'s lease having expired, but they being in the actual possession of the premises." It did not appear that this agreement was under the seal of the Company.

The defendants also entered into negotiations with the owners for a new lease of the premises, but no agreement was then entered into between them. It was, however, understood that the defendants were to hold the premises at the increased rent of 1000*l.*, and in all other respects upon the terms and subject to the covenants of the then existing lease, until some further arrangement should be concluded.

In pursuance of this understanding, the defendants paid, with the knowledge and consent of the solicitor of the owners of the premises, one half-year's rent; and on the 17th January, 1848, the said solicitor wrote to the receiver of the rents as follows:—"Messrs. Coward & Co. have agreed to hold over, as tenants from year to year, from the end of their lease, at 1000*l.* per annum. You will therefore have to receive 500*l.* to Christmas last."

The Company requiring immediate possession of the land, on the 6th March, 1848, gave notice of their intention to enter and take possession, whereupon the defendants wrote to the secretary of the Company, stating that

(*a*) See argument and judgment, ante, p. 669.

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they had been advised that the Company were not entitled to enter upon any portion of their premises at Lambeth, until the compensation to be paid to them as tenants from year to year should have been agreed upon or determined according to the provisions of the Lands Clauses Consolidation Act, and paid by the Company.

The Company then proceeded under the 85th section of the last-mentioned Act, to have a surveyor appointed by two justices, who valued the estate and interest of the defendants in the land and premises comprised in the first notice, at 1429*l.*, and their estate and interest in the whole of the manufactory and premises at 4189*l.*

The Company deposited the larger sum in the Bank, delivered a bond, and on the 15th of May entered and took possession of a part of the premises, and proceeded with their works.

The defendants, on the 3rd May, 1848, served the Company with a notice under the 68th section of the Lands Clauses Act (*a*), claiming 5000*l.* as the value of their in-

(*a*) Sect. 68 enacts, "that if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith; and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled, either by arbitration, or by the verdict of a jury, as he shall think fit; and if such party desires to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking, of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into an agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice of such his desire to the promoters of the undertaking,

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terest in the premises, and 20,350*l.* for damage; and called upon them to pay or enter into an agreement for payment of those sums, or to issue a warrant to the sheriff to summon a jury; and they gave them notice, that, in case of default, they would, within twenty-one days after the receipt of the notice, commence an action to recover the amount claimed.

The defendants also served a notice on the Company, to apportion the rent.

On the 13th June, an injunction was granted ex parte, by his Honor the *Vice-Chancellor of England*, to restrain the defendants from taking any proceedings whatever against the plaintiffs, under the notices of the 23rd May, or of the 25th of May, or otherwise to obtain or have made or settled, any apportionment of rent, with reference to the lands and premises in the bill mentioned.

July 18th. Mr. *Stuart*, Mr. *Faber*, and Mr. *R. P. Collier*, for the defendants, now moved to dissolve the injunction.—They contended, that the tenancy of the defendants, having commenced previously to the agreement by the owners with the Company, they were entitled, as tenants in possession, to notice of the intention of the Company to enter; that they had received no such notice, the original notices having, by the Company's return to the writ, been admitted to be abandoned. They further contended, that on three grounds the injunction ought to be dissolved; 1st, That the Railway Company had no right to enter without notice, and that they were mere trespassers; 2ndly, That if

stating such particulars as aforesaid; and unless the promoters of the undertaking be unwilling to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid, the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts."

the Company had a right to enter, and the defendants were not entitled to compensation, then the plaintiffs had a good defence to the proceedings at law, and there was no reason why a Court of equity should interfere; 3rdly, That, if the Company had a right to enter under the 85th section of the Lands Clauses Consolidation Act, the defendants would be entitled to compensation; and the proceedings adopted by them to recover the amount claimed, was the proper course. That the lessors had consented to the legal possession of the premises by the defendants, and that the agreement by them with the Company could not affect the defendants' interest. That the agreement was not binding, and invalid, because it was not alleged that it was under the seal of the Company: *Rex* v. *Bigg* (*a*), *Mayor of Ludlow* v. *Charlton* (*b*), *Paine* v. *The Strand Union* (*c*).

That it must be, that the defendants are entitled to some compensation, and if the injunction remain, it will preclude them from enforcing their rights; but if the proceedings at law by the defendants were permitted to take their course, the question of right to compensation would be first decided, and then the quantum: *Reg.* v. *Lancaster and Preston Junction Railway Company* (*d*). But that, at all events, the injunction preventing an apportionment of the rent, must be dissolved.

Mr. *Bethell* and Mr. *Beales* opposed the motion, contending, that the whole rights of the defendants in the property arose from an alleged equitable agreement, which could not justify proceedings at law. That, at the time of the agreement by the owners with the Company, the defendants had no legal right whatever, and were merely holding over, after the expiration of their lease. That the Company, having proceeded under the 85th section, the condition of the bond was substituted for the remedy given

(*a*) 3 P. Wms. 419.
(*b*) 6 M. & W. 815.
(*c*) 8 Q. B. 326.
(*d*) Ante, Vol. 3, p. 725.

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by the 68th section. That the 68th section did not apply to cases in which the question of right was doubtful; when the defendants had established their right, then they might proceed under it, but not before. That, however vague the agreement entered into by the owners with the Company, the relation of vendor and purchaser had already been established by the notices served by the Company on the owners: *Salmon* v. *Randall* (*a*), *Stone* v. *The Commercial Railway* (*b*).

Mr. *Stuart* replied.

The VICE-CHANCELLOR.—My opinion is, that I must continue the injunction. The case really appears to me to be beset with difficulty. Messrs. Coward & Co. were in possession of the manufactory in question, under a lease, which expired 24th June, 1847; and in the months of October and November, certain notices were given by the South Western Railway Company to take a portion of the land upon which a part of the manufactory stood; but, instead of proceeding directly to take and acquire possession during the existence of the lease, for certain reasons the matter stood over, and there was actually no possession taken until the month of May in this year. In the meantime the lease had expired; but there was a dealing going on between the South Western Railway Company and those who represented the inheritance in fee simple of the land in question, subject to the lease; and that gave rise to the execution, such as it was, on the 3rd of August, 1847, of an instrument. It does not become necessary for me to say exactly what the true construction of that instrument is, but it is perfectly evident that under it the Company, to some extent, acquired their right to the land in question, as against the reversioners.

(*a*) 3 My. & Cr. 439. (*b*) Ante, Vol. 1, p. 375.

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Then, it appears that there was some negotiation which had been going on prior to the execution of the lease, as to what should be done in respect of what was shortly to happen, namely, the expiration of the lease on the 24th of June.

Different letters, &c., passed between Messrs. Webb, who represented the owners of the inheritance, and Mr. Roberts, who represented the lessees; and there was an agreement made on the 3rd January, 1848.

Now, I cannot but think, that it will probably appear, when the matter comes to be investigated, that that agreement of the 3rd January, 1848, cannot be considered as a thing which of itself is to stand as against the Company, but that such interest as the Company acquired under the agreement of the 3rd of August, 1847, will give them a right to say how far that agreement of January, 1848, shall be carried into effect.

And then the Company took possession; and there was a species of proceeding, as I understand it, with reference, not to the value at the time when the Company took possession, but with respect to the value at an anterior time, when the lease was subsisting, and under which, for the purposes of the 85th section, money has been paid into Court, and a bond given according to that section.

Now, matters being in this state, and the fact being, as I understand it, that the uncertainty and delay, in a great degree, was attributable to the proceedings that were taken by way of mandamus, and they having at last terminated, the parties are placed in this awkward position, that they are incumbered with all the difficulties which have been produced by the negotiation with the reversioners, and by the agreement with the tenant. As it appears to me, it being, to say the least of it, somewhat uncertain what is the precise interest which the tenant has, and it, perhaps, admitting of some doubt, what is the precise extent of the interest which the Company has, the tenant has been ad-

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vised to issue a notice for the purpose of determining what ought to be the compensation made to him in respect of the damage done to his interest; and also to give another notice for the purpose of ascertaining what should be the apportionment of the rent.

Now, it has struck me all along, that it would be an extremely improper thing to allow those notices to go before a jury, and to be treated by a jury as evidence of a right, when it appears to me that, if necessary, a Court of equity itself should, in the first instance, determine what is the interest of the Company, and what is the interest which the tenant is entitled to have, and what is the rent that ought properly to be paid.

And if I were to dissolve the injunction, the very case which, as I understand it, the bill is filed for the purpose of having decided by the Court, will be thrown in a sort of huddled manner before a jury, and I have no reason to suppose that it would be properly treated before them.

It seems to me, therefore, that it is absolutely necessary, if the tenant have the right which he claims by virtue of the two notices, that the quantity of equitable interest which he has as tenant, and the quantity of rent which is actually payable, should, in the first instance, be determined, in order, that then, if he has liberty so to do, he may proceed either upon the notices already given, or such notices of a similar nature as may hereafter be given.

I cannot but think, that, in the present state of things, it would be quite wrong to dissolve the injunction.

The motion was afterwards renewed, by way of appeal to the *Lord Chancellor*.

The same counsel appeared and argued the case as in the Court below.

The LORD CHANCELLOR.—Assuming that the facts were

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sufficiently disclosed to enable me to see the relative situation of the parties, it strikes me that the *Vice-Chancellor's* order was not only right, but that no other order could possibly have been made. Certainly, what I have heard since, however cogent the arguments may be when the question comes to be decided what the interest of these parties is in those premises, has not only not tended to remove that impression, but has satisfied me that that order was right.

As to the question, whether the injunction ought to be dissolved so far as it refers to the apportionment of rent, it is clear that that depends upon the other question. How are you to make the apportionment of rent without knowing what the right of the defendant in the part taken is? Suppose the party has no interest in the other part, the right to apportionment fails—there is no apportionment. The two interests are quite connected together, and all depends on this, what is really the right and interest of the parties under the provisions of the Act of Parliament, looking not only to the provisions of the Act of Parliament, but to what has been done between the several parties interested in the property—the Railway Company, the party having the reversionary interest, and the party claiming as lessee.

It is only necessary to advert to the dates to shew how complicated it is, and how important to have a decision, not only of matters of law but of matters of equity, before it can be known what is the subject-matter the jury are to assess, if they are to assess any compensation. We find the lessee in possession of the lease which would expire in 1847, and in 1846, a year, or something more than a year, before the expiration of that lease, at the time when it was most essential for the Company to deal with the lessee, because they were not minded to wait till the lease had expired, and wished to obtain the legal possession of the property, we find that they gave notice to the tenant,

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for the purpose of leading to an arrangement by which they might buy up his interest, whatever it might be. That may or may not be considered as a contract, and may or may not be considered as in force, or it may be considered as entirely done away with by the subsequent transaction and lapse of time; but then the Company connect themselves with the lessee, that lessee having at that moment a year to run of his lease.

Then it appears that, in August, 1847, that is to say, two or three months after the expiration of the lease, and before anything could have taken place to create a new tenancy, the Railway Company entered into an agreement with the reversioner, by which as between themselves and the owners of the reversionary interest, they became entitled to this property; and that is the title under which the Railway Company held and hold up to the present time, as between themselves and the reversioner, and that agreement appears to have been communicated to the tenant in that same month of August. Here, then, is an agreement by the Company to purchase the reversionary interest from the reversioner, known to the lessee, whose lease had expired then about two months; that is, before anything is alleged to have taken place, or could probably have taken place to give him any further interest in the land than what he had under the original lease. With that knowledge, and subject to that agreement of course, the defendant enters into negotiations for a grant of a new lease, in January, 1848, with the reversioner, who had already parted with his interest, so far as the Railway Company had agreed to purchase it.

After this, the change of possession does not alter the interests of the parties; it is merely the effect of machinery provided by the Act of Parliament, by which, securing to the parties whatever interest they are ultimately entitled to, the projectors of the railway are entitled to possession: it does not alter the relative situation of the parties at all. Under these circumstances, the lease having expired, some-

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thing takes place, it is quite immaterial to consider what —lapse of time, or something else, takes place—by which the lessee is minded to say, "I have obtained a new interest in this property, a new claim, not under the original lease, for that is gone; but I say I am entitled to be considered as tenant from year to year, and therefore entitled to notice in respect of my interest, which may expire at the end of the year, or may, according to the time of the year, occupy a year and a half before it can be determined." He says, "I am entitled to that, and I insist on going before the jury to ask the jury to assess the amount of that interest." Is it so perfectly clear, under all those circumstances, looking at the dates of the transactions between the parties, that he is entitled to such compensation as he claims? The bill prays that it may be declared that he is not. I do not give any opinion on the argument I have heard, whether he has or has not such right; because it is not now the time to decide it. It is quite sufficient for the present purpose to say, that I am satisfied there is a serious question to be decided, and that nothing can be so idle as to send it to the jury to assess the supposed damage. Assuming the title to be what the one party claims and the other party denies, and there being so much of doubt as to what the lessee has done, as appears in the transactions which have taken place, the question is, whether this Court, which alone can decide those matters depending on transactions between the parties—all being in equity, none at law—whether the Court is to permit the assessment of the value to proceed before the jury, or to withhold a permission to do that, until after the Court shall have ascertained what really is, if any, the interest of the parties—the subject of valuation.

It appears to me the simplest case that can arise, according to the ordinary rule of administering injunctions, if you find a reasonable doubt upon the title asserted at law, dependent upon equitable circumstances, that is of itself suf-

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ficient to make it proper for the Court to preserve the property and the interest of the parties in the same situation in which they stand, until the Court, at the hearing of the cause, has the opportunity of deciding upon the rights of the parties. I am therefore of opinion, that I must continue this injunction, and that I should refuse this motion, with costs.

BEFORE THE VICE-CHANCELLOR AND THE LORD CHANCELLOR.

1849.
April 26th.
May 5th & 8th.

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A Railway Company had power under their Act to stop up a certain street, on their providing another road, which was to become "a public highway." The Company formed their railway on an embankment which crossed the street in question, and made another road, which compelled the inhabitants of the street to make a considerable circuit in order to reach the town of B.

THE bill in this case was filed by the North Western Railway Company, for the purpose of restraining proceedings by the defendant under the 68th section of the Lands Clauses Consolidation Act.

The facts were as follow:—By an Act of Parliament of the 9 & 10 Vict. c. ccclix, being "An Act for making a Railway from the London and Birmingham Railway to or near to Navigation-street, within the Borough of Birmingham," it was (amongst other things) enacted, that it should be lawful for the London and Birmingham Railway Company to make a railway from their then present line to or near a street called Navigation-street; but before the Company should proceed to stop up the passage along a road called Bartholomew-street, "they shall, to the satisfaction of the Commissioners of the Birmingham Street

The defendant, the owner of houses and property in the street so stopped, which were at a distance of fifty yards from the railway, and were not included in the Railway Act, gave the Company notice, in the terms of the 68th section of the Lands Clauses Act, of his claim for compensation, on the ground that his property had been injuriously affected by the formation of the Railway.

The Company thereupon filed their bill, praying an injunction to restrain the defendant from proceeding under that section.

Held, by the *Lord Chancellor*, reversing the decision of the *Vice-Chancellor of England*, that as the right of the defendant to compensation was not clearly established, and that, if he were allowed to proceed under the 68th section, two proceedings, one of which might turn out to be useless, would be rendered necessary to ascertain such right, the Court would assume jurisdiction to direct that an action on certain terms be brought in the first instance to ascertain the right, and that an injunction issue in the mean time.

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Act, lay out a good road instead of that road, which shall afterwards become a public highway." By an Act passed in the same year, but before the last-mentioned Act (9 & 10 Vict. c. cciv), with which the Lands Clauses Consolidation Act was incorporated, the London and Birmingham, Grand Junction, and Manchester and Birmingham Railway Companies were consolidated by the title of "The London and North Western Railway Company." The defendant was the owner of a factory, houses, and premises, situate in Bartholomew-street, at a distance of about fifty yards from the southern limits of deviation of the railway, and, until the formation of the railway, had access by a straight and direct road to the town of Birmingham.

None of the defendant's premises were set out or scheduled in the deposited plans or in the North Western Railway Company's Act.

The Company, before they proceeded to make their railway, which was carried along that part of the line on an embankment, laid out a good and sufficient road connected with Bartholomew-street, but running nearly at right angles to it, and crossing the railway at a point much higher up than that at which it intersected Bartholomew-street.

The defendant, alleging that his property had been injuriously affected by the interruption of his direct communication with the town of Birmingham and the formation of the railway, on the 1st of March, 1849, served the Company with a notice, under the 68th section of the Lands Clauses Act (*a*), requiring them to pay him 2000*l.* as compensation for damages or loss then sustained or thereafter to be sustained by him, in respect of his interest in the houses and erections in Bartholololomew-street, or to summon a jury under the 68th section of that Act; upon which the Company filed their bill against the defendant, seeking a declaration that he was not entitled to any compensation in respect of the houses, &c. belonging to him, and that, if necessary, an issue might be directed to try

(*a*) This section is set out at length, ante, p. 707, note.

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whether the houses and premises of the defendant had been *injuriously affected* by the construction of the railway and works, and that the defendant might be restrained from taking any proceedings against the plaintiffs under the notice of the 1st of March, 1849, and from taking any proceedings at law against the plaintiffs to recover the sum of 2000*l.* so claimed by him as aforesaid.

The bill (amongst other things) charged, that no injury whatever had been done by the construction of the railway and works to any part of the defendant's premises, or to any right or easement appurtenant thereto, and that, if the plaintiffs were to issue their warrant to the sheriff to summon a jury for settling the amount of the compensation claimed by the said defendant, as required by the said notice, they would thereby admit that the defendant was entitled to some compensation in respect of the premises; that a jury, if summoned for the purposes aforesaid, under or by virtue of the provisions in the Lands Clauses Consolidation Act, 1845, would have no jurisdiction, power, or authority to determine or entertain the question, whether the defendant was or was not entitled to any compensation in respect of the premises; that the plaintiffs were advised, that if they should make default in issuing their warrant to summon a jury for settling the amount of compensation claimed by the defendant, within twenty-one days after the receipt by them of the notice, the defendant might recover the full amount of compensation claimed by him, with costs, by action in any of the superior courts, and that there was no provision in any or either of the several thereinbefore stated Acts of Parliament, or in any Act of Parliament incorporated therewith, under or by virtue of which it could be determined, whether the defendant was or was not entitled to any compensation, and such question could not be determined without the aid and assistance of the Court.

Affidavits were filed on both sides, but they had reference principally to the question of damage or injury sus-

tained by the defendant by reason of the stoppage of the thoroughfare along Bartholomew-street, and the construction of the line of railway across it.

Mr. *Bethell* and Mr. *Speed*, on behalf of the Company, now moved for an injunction, according to the prayer of their bill.

Mr. *Malins*, Mr. *Metcalfe*, and Mr. *Phipson*, contrà (*a*).

Mr. *Speed* replied.

The VICE-CHANCELLOR.—The defendant alleges, as a matter of fact, that he is within the Act, because the thing that has been done has "hurt" his property. I use that as an equivalent to the phrase in the Act of Parliament, "injuriously affected;" and if the true construction of the 121st section, in connexion with the 68th—if the unavoidable construction of the words in the 121st section is "hurt," in any sense of the word, without regard to whether the thing is done de jure or sine jure,—if that is the true construction, the question of fact is brought forward on the proceeding which the defendant has thought proper to institute. I myself do not, unless you wish it, require the discussion to be carried any further, because the question must be tried somehow or other, and the method of trying it by means of proceeding on the notice that you have given, is as good a method as can be devised. I do not see that there is anything so plainly wrong and contrary to law in the course that the defendant has adopted for the purpose of having the question of fact decided by a jury, as to justify this Court in interfering, whatever view it may take of the meaning of the words of the Act. Suppose a person in that very street had a glass-shop within half a yard of the line of the railway,

(*a*) The argument of counsel is given before the *Lord Chancellor* next page.

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the constant tremor in which his shop might be kept by the passage of the engines on the rails, might produce such a destruction amongst his goods as would very much affect his interest. In such a case, I cannot but think that the house might be said to be injuriously affected, although the Company might have a perfect right to do what they did. The present case comes to this, that by the building of the railway, which is lawful, the tenant of a particular house is necessarily put to a greater course of perambulation than he otherwise would be subject to. Whether that does or does not affect the house, is a question for a jury. I must therefore refuse the present application.

May 5th. The Company now renewed their motion for an injunction, by way of appeal, before the *Lord Chancellor*.

Mr. *Bethell* and Mr. *Speed*, in support of the motion.—Those parties alone are entitled to proceed under the 68th section of the Lands Clauses Act, who are clearly entitled to compensation. The parties so entitled are defined by the 6th section of the Railway Clauses Act, to be "the owners and occupiers, and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof. The injury here meant, must mean a direct injury, such as the interruption or deprivation of an easement; it cannot apply to any inconvenience to which the defendant, together with the rest of the public, is subjected. That cannot be called a public nuisance, which is done under the powers of an Act of Parliament, nor is any compensation to be given in such a case, unless it is specially provided for by the Act conferring the powers.

If the defendant be permitted to proceed under the 68th section of the Lands Clauses Act, the Company are compelled to issue a warrant for summoning a jury, which will admit the right to compensation; but if they omit to do so,

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then if the defendant recover by action against the Company the smallest amount of damages, he would, under the 68th section, be entitled to the full amount claimed.

There ought to be a preliminary inquiry, to ascertain the defendant's right to compensation: *Regina* v. *The Lancaster and Preston Junction Railway Company* (*a*), *Rex* v. *Bristol Dock Company* (*b*), *South Western Railway Company* v. *Coward* (*c*). A Court of equity has no jurisdiction to interfere with the tribunal appointed by the act, when the right of the party to compensation is clear: *Barnsley Canal Company* v. *Twibill* (*d*); but when the right is uncertain, it will not allow proceedings which would in fact prevent the question of right being raised at all.

Mr. *Malins*, Mr. *Metcalfe*, and Mr. *Phipson*, contrà.—This Court has no jurisdiction to interfere with the statutory means of relief given to the persons whose lands are injuriously affected. The Act draws no distinction between cases of direct and indirect injury. The question of injury will be decided by the finding of the jury summoned, in accordance with the provisions of the Act. If they are of opinion that the defendant is not entitled to any, or to a very small amount of compensation, their verdict will at once decide the question, without compelling either party to enter on an expensive litigation. If the Company refuse to summon a jury, the defendant must bring his action to recover the amount of compensation claimed, and in that case he must shew that he has a right. It is no ground for the interference of a Court of equity, that the Company may by their own remissness be subjected to a larger amount of damages than they would have been, if they had strictly complied with the provisions of the Lands Clauses Act. The Court will not interfere with the legal remedy of a creditor against the debtor: *Pim* v. *Wilson* (*e*).

(*a*) Ante, Vol. 3, p. 725.
(*b*) Ante, Vol. 1, p. 548.
(*c*) Ante, p. 687.
(*d*) Ante, Vol. 3, p. 471.
(*e*) 2 Ph. 653.

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If the injury to the property of any individual arises from the legitimate exercise of the powers of the Company, then he cannot bring his action, for the Act provides the means of giving him compensation: *Boulton* v. *Crowther* (*a*). If they are exceeding their powers, the remedy of the individual will be by action: *Thicknesse* v. *The Lancaster Canal Company* (*b*). If the argument of the plaintiffs is allowed to prevail, any person whose premises are injuriously affected, will, in addition to all the proceedings under the Lands Clauses Act, be subjected to a Chancery suit and an action at law in order to obtain his remedy. The defendant is not in a position to proceed by action, for he would be immediately met by the objection, that the Act has given him another remedy. Before the passing of the Lands Clauses Act, the remedy of the landowner was by mandamus, and the 68th section of that Act is now substituted for the more tedious proceedings by mandamus.

The LORD CHANCELLOR (without hearing a reply).—It would have been undoubtedly very inconvenient if they whose duty it is to administer equity in this Court, had, when these questions first arose, repudiated the jurisdiction, and left the parties to fight it out as they best might, by legal proceedings; but the Court thought proper to exercise what was, in my opinion, a very wise jurisdiction, and one which was clearly within its power, inasmuch as the interests of the public required it. The Court assumed a jurisdiction over the parties interested under these various Acts, so as to keep the one side and the other within the powers which the Acts gave them. This principle has been acted upon extensively against Railway Companies, and it must be right to act in the same manner against those who are opposed to these Companies; justice must be even-handed, and the same rule which applies to the one must apply to the other. In these cases the Act of

(*a*) 2 B. & C. 703. (*b*) 4 M. & W. 472.

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Parliament confers certain rights, and of all the rights that an Act can confer, there is hardly one more stringent than that which is given to the party complaining of damage in these cases. The provision is a most extraordinary one. I do not say that it is wrong—it is the law, and must be obeyed; but to say, with respect to a Company against whom a perfectly unjust claim is made, where the party has no shadow of title at all, when he asks for a large sum of money by way of compensation for an injurious damage against the Company—that the effect is to be this, viz. that if the Company do not, within twenty-one days, take measures to go before the sheriff's jury, they are to be fixed with the whole sum claimed, repayment of which cannot afterwards be obtained—that is as severe an enactment as a Company can well be subjected to; and how are they to escape? Their only way is to go before a sheriff's jury, and to incur all the expense of having the damages assessed for an injury which may not really exist; and all this is to take place when, in point of fact, the Company may be certain, that, at whatever amount the jury assess the damages, the party making the claim has no right to receive it.

Then, this course having been pursued—according to the construction put on the Act by the defendant's counsel, (which I do not think it necessary to question—it may be perfectly right, but it does not enter into my view of the case one way or the other) the next step is, that there is an action to be commenced by the party who has obtained the verdict of the sheriff's jury for a large sum of money, which the Company contend is not due or payable at all; and then, after all these proceedings have been had, the Company may discover that they are right, and that the party making the claim is in the wrong; and if he cannot shew that he is entitled to this compensation, then he will, of course, fail in his action, and there will be an end of the contest. But two proceedings will have taken place—the inquiry before the sheriff's jury, and the action.

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I do not know whether any compensation is recoverable for the costs and expenses of that proceeding, under the Act; but it is no small grievance to any Company or individual, to be dragged through a litigation which must end in nothing beyond merely ascertaining the amount of damage, without any inquiry being first made whether anything is due in respect of that damage. That provision appears to have been introduced into the later Acts, for the purpose of avoiding a mandamus. They who introduced that provision for that purpose, could not have been aware of the consequences of what they were doing. Previously to that provision, when a Company could only be compelled to go before a sheriff by a mandamus, the Court opened the door, and first decided the right, because, on the application for a mandamus, whatever actual damage might be sustained, the Court of Queen's Bench had an opportunity of seeing whether, independently of the question of damage, there had been injury done to the party seeking the mandamus—whether the party under the Act was entitled to compensation for the damages that he had sustained. The law, therefore, provided the remedy, and provided the means by which the question of right might be decided, before the question of the amount of damage was investigated.

So stood the law. Then comes an Act of Parliament which, for the purpose of correcting that supposed evil, creates a much greater one, by depriving the Company of the means of ascertaining the question of right before they go to the sheriff's jury to assess the amount of compensation. That circumstance alone, if it were not within the general jurisdiction of the Court, would be quite sufficient to justify the interposition of this Court, because it would not be just to permit a party to be involved in that sort of litigation, without first ascertaining whether the right claimed existed as between the party and the Company against whom the claim is made. The only remedy for

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that is an equity which applies in all cases to the party who is sought to be affected—and so grievously affected as it appears to me the Company would be by the provisions of the late Act. They are entitled to come here for an injunction, on the ground that the claimant is putting in force against them the strong powers given by the Act of Parliament, whereas those powers are given only to certain persons, of whom they allege the claimant is not one; his case does not fall within the description of the parties who are entitled to exercise those powers. If the Company exceed their powers, the party affected by that excess comes here to confine the Company to their powers. But here the power is exercised by the individual complaining against the Company, and the Company therefore comes here and makes the complaint; and the Court, in a motion for an injunction, is to see whether the party so complaining is entitled to exercise the power given by the Act.

This is the whole equity, and it is equity enough on that question. The Court must see and ascertain how the relative rights and liabilities of the parties stand; but it is met at once by a legal question:—Here is a party placed in the peculiar situation of having houses very likely to be more or less affected by the works of the Company. The works, however, are directly authorised to be done by the Act of Parliament, but they may or may not produce what may be called damage to the individual occupying the house. If the Company be liable to him, it is obvious that the Company are liable to all his neighbours; but the difference between the injury to one house and another, in that street, must be very small, and must be difficult to ascertain, when a case arises in which the owner of one house may be entitled to compensation, and the owner of the next house not. It is important to decide the general question, which it is quite clear is a question of law, and a question which this Court ought not to decide. The Court must either refuse to interfere, which would not be

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just; or, in order to interfere with propriety, it must know what the right is,—it will put the parties in the same situation, coming here for an injunction, as they would have been in, if, instead of making such an application here, they had applied to the Court of Queen's Bench for a mandamus, in order, first of all, to ascertain what the right is. We must see what is the most convenient course of ascertaining that right. There are two modes of doing it: one is open to the great inconvenience of ascertaining the amount of damage before inquiring into the right, when it may turn out that no right exists in the plaintiff, and that proceeding may therefore be useless: the other mode is, to do that which must, at all events, be done; namely, there must be an action so framed as to raise the question of right, and obtain a decision on that question. If in that action the party claiming fails to establish a right, one proceeding is sufficient, and the question of the amount of damage becomes immaterial. In the other mode, there would be the inconvenience of two proceedings, and the result may be, that the assessment of damages may be perfectly useless, if the plaintiff fail to establish his right.

Now, which is the most convenient course? Of necessity, the action to try the right must be proceeded with; is it not, then, more convenient to have the right established first, than to proceed to ascertain the amount of damages first, which may become entirely useless? To have the title tried first, which must be tried, occurs to me to be the most simple proposition, and to come entirely within the jurisdiction which the Court has so long exercised, in order that the parties may really know how they stand towards one another. My opinion is that which I have already expressed, namely, that the most convenient mode of trying the question is, for an action to be brought by the defendant against the Company, the Company admitting (adhering to the terms of the Act) that they were served with a

demand for compensation, under the provisions of the Act, and that the Company suffered twenty-one days to elapse before they proceeded to summon a jury. That will bring before a Court of law all that it required, in order to ascertain the right of the plaintiff. If he succeed, then no injury will be done, except this, of having the action tried first, and assessing the damages afterwards; and such, I think, ought to be the order.

The *Vice-Chancellor*, I must say, does not appear to me to have had any difficulty about the matter, because he conceived the proceedings before the sheriff's jury would answer all the purposes. It is not now contended before me, that that would be so. The counsel on both sides agree that there must be another proceeding, after assessing the damages before the sheriff, in order to try the question of right, and that seems to me to be the difficulty. The supposition that no such difficulty existed, led to the *Vice-Chancellor's* order. It being clear to me that that is not so, I do not think that there is any difference of opinion between myself and the *Vice-Chancellor* on the real question as to the necessity of trying the right before assessing the damages.

Mr. *Bethell* then suggested the following as the proper form of the order to be made on the motion, which was assented to by his Lordship; viz.—Discharge the *Vice-Chancellor's* order—Let the injunction issue as prayed—Let the defendant be at liberty to bring an action against the Company, and let the Company in such action admit that the defendant has given notice in writing to the Company, and has, in and by such notice, stated the nature of his interest in the land in question, and has claimed 100*l.* as compensation in respect of such land being injuriously affected by the execution of the works of the Company, and also desires to have the same settled by a jury; and also admit that the Company did not, within twenty-one days

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after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling such compensation. After the trial of such action, let either party be at liberty to apply—the parties undertaking to use the judgment under the direction of the Court.

BEFORE THE LORD CHANCELLOR.

Feb. 8th, 9th, 17th, & 21st.

BEARDMER *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

A Railway Company, at the instance of the commissioners of paving, raised the height of a bridge over the railway, and made the gradient of the ascent 1 in 105, instead of 1 in 40, as shewn by the deposited plans and sections.

The plaintiff's premises would not have been reached by the incline, as exhibited in the deposited plans; but, by the alteration, an embankment five feet in height passed by two sides of that part of the plaintiff's premises which faced the street, partially obstructing the access and the supply of light and air.

THE plaintiff in this cause was a smith and farrier, carrying on his business in premises situate at a corner formed by Navigation-street and Hill-street, in the town of Birmingham, which streets crossed each other at right angles.

According to the original plans and sections, deposited with the clerk of the peace, for the formation of the Stour Valley Railway, the line of rail would pass Navigation-street in a cutting, and that street was proposed to be carried over the railway by a bridge 6ft. high, the ascent to which was to be 1 in 40, and would commence at a point to the eastward of, that is, nearer to the railway than the intersection of the streets, and the level of Hill-street would remain unaltered.

The Railway Company afterwards, at the instance of the commissioners of paving, determined to make the

The *Vice-Chancellor of England* having granted an injunction on the ground, that, according to the deposited plans and sections, the Company had not power to make the alteration whereby the plaintiff's premises were affected:—*Held*, by the *Lord Chancellor*, discharging the order of the *Vice-Chancellor of England*, that, except where the plans and sections form part of the Act, they are referred to for the purposes of determining the datum line only.

That, in the present case, the plans and sections, although referred to, were not so incorporated into the special Act, and did not so form part of it, as to preclude the Company from availing themselves of the powers conferred by the 16th section of the Railway Clauses Act.

That the words of the 14th section of the General Act, "engineering works," apply to the line of rail only.

That the General Act contains no restriction as to the height of a bridge over the line of rail, the only restriction being as to the gradient of ascent to such bridge.

height of the bridge 8ft. instead of 6ft., and to make the ascent 1 in 115 instead of 1 in 40; and in order to effect this, the Company were obliged to commence the ascent to the bridge in Navigation-street before it reached the point of intersection with Hill-street; and where Navigation-street crossed Hill-street the level was raised 5ft., and slopes were made on either side to preserve the passage along Hill-street.

A mound of earth, to the height of 5ft., was consequently raised along one side of the plaintiff's premises, and on the other a slope running from 5ft. to 0.

The bill, after stating these facts, and also (among other things), that, in December, 1848, a lease of the Stour Valley Railway had been granted to the London and North Western Railway Company, and also stating the different Acts of Parliament relating to the railway(*a*), and the Birmingham Paving Act (9 Geo. 4, c. liv), prayed an injunction against the Company in the terms set out in the judgment of the *Lord Chancellor*.

Affidavits were filed on both sides. Those of the plaintiff went to shew that direct access to the plaintiff's premises had been prevented, and that free passage to the light and air had been materially obstructed. The affidavits of the Company, on the other hand, tended to shew that the inconvenience to the plaintiff was trifling; that a ready access to his premises might be obtained on the same level as before, by entering at the point where the embankment ended; and that the alteration in the Company's plans had been made at the instance of the commissioners of paving, for the benefit of the public.

The *Vice-Chancellor* was of opinion that the Company had exceeded their powers, by departing from the original plans and sections as deposited prior to the passing of their

(*a*) 9 & 10 Vict., c. cciv, c. cccxxviii, and c. ccclix, and 10 & 11 Vict. c. cxx.

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Act, and granted the injunction accordingly on the 9th of February.

The Company now sought to discharge his Honor's order.

The sections referred to in the argument were the 35th section of the Stour Valley Railway Act (9 & 10 Vict. c. cccxxviii), and the 13th, 16th, and 50th sections of the Railway Clauses Consolidation Act.

The material parts of the 16th section of the last-mentioned Act is set out in the judgment(*a*).

Mr *Bethell* and Mr. *Speed*, for the Company.—The order of the *Vice-Chancellor* for an injunction is grounded on the supposition that the Company are bound by the plans and sections deposited previously to the passing of the Act. The words of the Act, in the present case, are not stronger than those in *Braynton* v. *The London and North Western Railway Company*(*b*), or in *Tod* v. *The North British Rail-*

(*a*) The 35th section of the Stour Valley Railway Act was as follows: "And whereas plans and sections of the railway, shewing the respective lines and levels thereof, and also books of reference, containing the names of the owners, lessees, and occupiers, or reputed owners, lessees, and occupiers of the lands through which the respective lines of railway are intended to pass, have been deposited with the clerks of the peace of the counties of Warwick, Stafford, and Worcester, be it enacted, that, subject to the provisions in this and in the recited Acts contained, it shall be lawful for the said Company to make and maintain the said railway and works in the line and upon the lands delineated on the said plans."

The 13th section of the Railway Clauses Consolidation Act was as follows: "Where, in any place it is intended to carry the railway on an arch or arches, or other viaduct, as marked on the said plan or section, the same shall be made accordingly; and where a tunnel is marked on the said plan or section, as intended to be made at any place, the same shall be made accordingly, unless the owners, lessees, and occupiers of the land in which such tunnel is intended to be made shall consent that the same shall not be so made."

(*b*) Ante, Vol. 4, p. 553.

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way Company(*a*). The judgments in both cases shew such an opinion to be erroneous. But even if the deposited plans are retained by the Act, it never was intended that they should govern or control the powers of deviation and alteration conferred by the general Act.

Even if the Company are exceeding their statutory powers, it does not follow that the plaintiff has sustained such an injury as would amount to a nuisance; and he ought not to have the benefit of an injunction until he has established his right: *Attorney-General* v. *Nichol*(*b*).

Mr. *Stuart* and Mr. *Craig*, contrà.—The Company do not attempt to bring their case within the exceptions contained in the 14th section, and therefore they are prevented, by the words of that section, from raising their bridge or altering their gradients(*c*). [The *Lord Chancellor*.—The words of the 14th section, "other engineering works," seem to refer to the line of rail, and not to the alteration of the levels of streets, roads, or ways, mentioned in the 16th section of that Act.] If the plans are not to form part of the Company's Act, no limit is imposed on their works, and they might build their bridge so high that the whole town may be affected by it.

In *Tod's case*, there was a deviation of the line of the railway, which brought it within the exceptions contained in the 14th section; but if there is no such deviation, then the positive enactment of the section confines the Railway Company, in their engineering works, to the plans and sections they have deposited.

In support of the form of the injunction, the case of *Lord Mexborough* v. *Bower*(*d*) was cited.

(*a*) Ante, Vol. 4, p. 449.

(*b*) 16 Ves. 338.

(*c*) Sect. 14 enacts, that "it shall not be lawful for the Company to deviate from or alter the gradients, curves, tunnels, or other engineering works described in the said plans or sections, except," &c.

(*d*) 7 Beav. 127.

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Mr. *Bethell* replied.

The LORD CHANCELLOR.—In this case an injunction has been granted by the *Vice-Chancellor*, restraining the Company in these terms: "That an injunction be awarded to restrain the defendants, the London and North Western Railway Company," and so on, "from continuing to make the embankment or incline in the course of being made by them in Hill-street, in the county of Warwick; and from continuing to make the embankment or incline in the course of being made by them in Navigation-street, in Birmingham, to the westward of the point at which the east side of Hill-street crosses Navigation-street; and from in any manner altering the level of that part of Navigation-street which lies to the westward of the point at which the east side of Hill-street crosses Navigation-street; and from altering the level of Navigation-street aforesaid to any other extent or in any other manner than is shewn upon the plans and sections deposited with the clerk of the peace of the county of Warwick, for the purposes of the Birmingham, Wolverhampton, and Stour Valley Railway."

Now that is an injunction restraining the Company from deviating from the levels as appearing on the face of the plans deposited with the clerk of the peace, under the Act. And, upon looking at the bill, I find the equity put by it is quite in conformity with the injunction granted by the Court, the equity being, that, previously to the Act passing, according to the rules and regulations of the Houses of Parliament, certain plans were deposited with the clerk of the peace, on the face of which there was represented the line that the railway was to take, crossing Navigation-street; which street is again intersected, at a short distance from the place where the railway crosses it, by Hill-street. The plan represents those two streets, and it represents the line which the railway is to take; and the bill makes this case, that, these plans having been exhibited, and being,

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as it is presumed, part of the contract, the parties are not at liberty to deviate from the plan as represented by those two descriptions.

Now that, in point of fact, is neither more nor less than bringing forward again what the House of Lords have twice decided is no ground for the interference of a Court of equity. The two cases I now refer to, as I understand them, are identically the same. In one of them, viz. *The North British Railway Company* v. *Tod*, the plan deposited with the clerk of the peace, before the Act was passed, represented the line of the railway, and of course represented the level at which the railway was intended to pass through certain lands, and it also represented the surface level of the land. It represented, therefore, the line in which the railway was to pass through the land by a cutting, and also the surface level of the land. The Railway Company, in pursuance of their powers, deviated within the prescribed limits, and did not carry their railway precisely in the line which was contemplated by the plan, but varied it within the limits allowed under the Act; and the railway being on the side of an inclined surface, the preserving of the same level would necessarily affect its proximity to the surface level of the land. If it was higher up the hill, of course there would be a deeper cutting; and if it was lower down the hill, there would be a less deep cutting. It would then be nearer the surface, and the proprietor of the land would find himself very much annoyed; but the Company having so altered the line of their railway, and approached nearer the surface, and thereby added very much to the annoyance and the disfigurement of the ground which was within view from the proprietor's house, he applied for an injunction, or an interdict, which is the same thing, to prevent the Railway Company from so far deviating from the plans exhibited. The House of Lords had that question to decide, and did so without adopting any new rule, but merely applying the rule (which, though easily comprehended,

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does not appear to have been very distinctly understood), laid down, long before, in the *Heriot's Hospital case* (a), by which it was decided, that the plans, per se, constituted no obligation, and conferred no right; but that the plan, so far as it was referred to in the Act, and incorporated in its enactment, became part thereof, and was, therefore, material, in order to construe the enactment. For instance, if the Act of Parliament enacted that the railway should go in the line described in a particular plan, it is obvious that the plan must be referred to, in order to understand the enactment. So far, therefore, as it was incorporated in the Act, it was part of the Act; and, so far as it was not incorporated therein, it was a matter not creating any right between the parties. That was the rule which had been established for a great number of years; and, in the case of *The North British Railway Company* v. *Tod*, it was again acted upon in the House of Lords. In that case, the plan, as far as it represented the surface, was departed from. The surface, after the railway had been completed according to the deviation, no longer exhibited the same surface appearance as it had done previously; the railway was no longer carried at the same distance from the surface as it was before. But the House of Lords came to this conclusion, that the plan was not referred to for the purpose of exhibiting the surface appearance, but it was referred to for the purpose of shewing what was the datum line, what was the level at which the railway itself was to be carried; and, therefore, inasmuch as the Act referred to it only for the purpose of the datum line, it was nothing to say that the plan of the surface then would be, in every respect, different from the surface as represented on the plan, because the plan was not part of the Act. That is a very intelligible rule, and very easily applied to the various cases.

Now, in the present case, the plan exhibited shews, no

(a) *Feoffees of Heriot's Hospital* v. *Gibson*, 2 Dow, 301.

doubt, Hill-street, and also Navigation-street, in the state in which those streets existed before the railway was made; it shews the line of the intended railway, and all those parts of the neighbourhood which were within the operation of the Act, that is to say, all those pieces of land which the Railway Company had power to deal with according to the provisions of the Act; but it represented them as they then existed: it did not represent them for the purpose of shewing in what state they were to exist after the railway was completed, but represented a portion of the land which might or might not be affected by the railway, and beyond which the powers of the Railway Company were not to extend. The plan also pointed out the line of the intended railway, which, of course, was not to be necessarily carried into operation precisely in that line, because the Act of Parliament authorises, to a certain extent, a deviation. In the course of effecting these works, the railway passing in a cutting, the Company had to build a bridge for the purpose of continuing Navigation-street over their railway; they were obliged to cut through Navigation-street, and, having done so, the Company were of course under the necessity of restoring the street, with a view to enable passengers, horses, and carriages to pass along it.

Now, the Railway Clauses Consolidation Act contains no restriction as to the height at which any bridge over a street is to be made; it contains a restriction as to the ascent to a bridge, but it is left entirely to the discretion of the Company what height any bridge should be made over the cutting through which their railway is to pass; and it is obvious that, as they had a power of deviation, that is, of a vertical deviation to a certain extent, the height of the bridge to be built by them would depend on the fact, whether they did or did not exercise the power of vertical deviation. If the Company made their line of rail lower, the bridge might be less high, with reference to the surface level of the railway; if they made the line of rail higher, then, of course,

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the bridge must necessarily be higher with reference to the surface-level; but the Act contains no restriction on that subject at all, the only restrictions being in the 50th section, which merely provides, with reference to the ascent to be made to the bridge, that it shall not be more than one foot in thirty feet, if it be a turnpike road, or one foot in twenty feet, if it be a public carriage road, or one foot in sixteen feet, if it be a private carriage road; and, subject to those restrictions, the Company were at liberty to build their bridge at any height they might find convenient.

The whole argument turned on the construction to be put on the 16th section of the Act, which provides, that, "subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the Company, for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works: that is to say—They may make or construct in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, railroads, or tramroads, rivers, canals, brooks, streams, or other waters, within the lands described in the said plans, or mentioned in the said books of reference, or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences, as they think proper." It then proceeds thus: "They may alter the course of any rivers not navigable, brooks, streams, or watercourses, and of any branches of navigable rivers, such branches not being themselves navigable, within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages, or other works, over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level of any such rivers or streams, roads, streets, or ways, in order the more conveniently to carry the same

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over or under, or by the side of the railway, as they may think proper," making compensation to the parties injured by the course they think proper to adopt. Here is a very distinct parliamentary authority to deal with all the lands within the plans deposited, or mentioned in the books of reference, as they think proper; the Company may make roads, inclined planes, and so on, and they may deal with them in such a way as they may think right, for the purpose of more effectually carrying their works into effect, and rendering them of the least possible inconvenience to the proprietors of the adjoining land. But the power is unlimited, and the restriction as to the land over which these unlimited powers are to be exercised, is applied only to such lands as are described in the plans, or mentioned in the books of reference. Now, it is not in dispute that Hill-street and Navigation-street are within the plans, and are described in the books of reference. Then, having this power, what are the Company doing? Why, they are raising the level at a particular point of these two streets; and the 16th section of the Railways Clauses Consolidation Act says, that that is precisely what they may do: "they may alter the level of roads, streets, or ways;" these are roads, streets, or ways; and what the Company are doing is the raising the level of those streets, roads, or ways. It is difficult to conceive any parliamentary authority more clear and distinct than that which is conferred by the 16th section of this Act.

Then, it is urged on behalf of the plaintiff, that though that be true, there may be other parts of the Act which make the representation of these plans conclusive between the parties. It would, indeed, be very strange if any such parts of the Act were to be found, inasmuch as they would be in direct contradiction to the 16th section; still, however, we must look to see whether it be true that there are other parts of this Act which refer to the plans as conclusive that the line shall not vary from what appears to be

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described on the face of the plans themselves. Now, it would be very extraordinary if we found any such; and for this reason, that there is a power of deviating laterally. It is quite obvious, that, if the line of the railway be deviated from, it would bring it nearer to the land on one side of the projected railway, and further from the land on the other side of the projected railway; and, thereby, you immediately alter the relative situation of the railway with the adjoining land, as described in the plan. But, according to the argument, all the other lands must remain exactly where they are: they are described as of a certain level; and, although the Company would have power to deviate laterally to a certain extent from the line laid down on the plan, they have no power to accommodate the neighbouring land, or the neighbouring estates, to the line so adopted by the deviation. It is quite obvious it would reduce the case to an absurdity to give them a power to do that in one part of the land, and in another part of the land deprive them of the means of carrying it into effect. But, upon perusing the other clauses of this Act, I find nothing like a recognition of the plan, as describing the neighbouring lands, and providing that they shall remain in the state there represented.

Now, the only section that is referred to with anything like an appearance of confidence, is the 14th; and the 13th and the 14th sections must be read together, as they conduce to the construction to be put on the 14th. The 13th section says, "where in any place it is intended to carry the railway on an arch or arches," clearly confining it to the railway itself; that is, the line of the railway. Then comes the 14th section, which says, that "it shall not be lawful for the Company to deviate from or alter the gradients, curves, tunnels, or other engineering works described in the said plan or section, except within the following limits, and under the following conditions." Then follow the limits and conditions, which are all confined to the line of the

railway itself. The words used are relied upon to shew that this is an enactment, that there shall be no departure from the engineering works, and that these engineering works mean all the works which might become necessary in consequence of the making of the railway. It is clear that these other engineering works mean other engineering works ejusdem generis, that is, other engineering works in the formation of the railway itself. There is nothing in the 13th section, nor is there anything in the 14th section, referring to anything but the works for the purpose of making the railway itself; and the exceptions and conditions are all exceptions and conditions confined exclusively to the works of the railway itself. Now, those are the only words which support the argument at the bar, that there is this gross inconsistency on the face of the Act, viz. that by the 14th section it is provided that there shall be no deviation from the works as represented on the plan; and the 16th section gives the Company the power to alter the level of the roads as they shall think proper.

Where there are two sections, which, according to one construction, would be directly opposed to each other, and another construction, by far the most natural and obvious, and consistent with the common use of language, which would create no such inconsistency, there is, of course, no choice which of those constructions ought to be adopted; the 14th section is confined to the railway itself, and the 16th section is intended generally to relate to everything that the Company might think it expedient to do throughout, for the purpose of the undertaking, and which, in that section, are called accommodation works—a word not to be found in the 14th section at all, and introduced into the 16th section, because that section is meant to apply to those collateral works which may become necessary in consequence of the principal works being carried into effect. There is no use in looking through the other sections of the Act; I do not think that

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there are any which come at all near the point which the plaintiff wished to attain: and the 14th section, which I observed upon, does not at all aid the construction.

So much for the Railways Clauses Consolidation Act. Now the only description we find in the particular or special Act is the 35th section, which it is quite clear refers only to the line of the railway. [Here his Lordship read the 35th section of the special Act(*a*).]

Now, the result of the whole is, that that 16th section gives a power, which is clearly the power that these parties are about to exercise, and is not restricted or controlled by any other part of the Act.

It is, therefore, distinctly brought within the case of *The North British Railway Company* v. *Tod*, that the object for which the plans are referred to is, the line of the railway—they are are not referred to for the purpose of ascertaining the position of other lands described and referred to in the book of reference; they are only introduced there for the purpose of shewing what were the lands within the option of the Railway Company in execution of their powers, which might be affected; and therefore it is precisely what the House of Lords decided in the case of *The North British Railway Company* v. *Tod*, viz. that the plans were operative, only so far as they were intended to be referred to for the purpose of explaining the enactment, and were not operative, so far as you shew the plans were not adopted by the Act, or incorporated in it by the clauses.

It appears to me, therefore, very clear, that this case is one that falls within those which have already been decided, and that there is no ground for the injunction which has been granted; and therefore the order for the injunction must be discharged.

Now, that would be all that it would be ordinarily necessary to do; but a doubt has been raised as to whether

(*a*) See ante, p. 734.

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that which the Railway Company are doing is done within their own power or under the power of the local commissioners. That is only material with the view I mentioned before, and which the acquiescence of the Railway Company render it unnecessary for me to make any further observation upon. It was hardly possible to leave that question open; for it might create some difficulty in the prosecution of the claim of the plaintiff to compensation for the damage which he might sustain. The Railway Company, however, have met that by saying, that they would undertake the responsibility of making whatever compensation the plaintiff is entitled to claim; and that undertaking will therefore be recited in the order I now make.

Order for injunction discharged.

BEFORE THE MASTER OF THE ROLLS AND THE LORD CHANCELLOR.

June 7th & 14th.
Nov. 6th & 8th.

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A Railway Company having obtained an Act of Parliament for the construction of a railway from London to Portsmouth, expressed an intention wholly to abandon the project, but subsequently,

BY an Act of Parliament passed 9 & 10 Vict., intituled "An Act for making a Railway from the Croydon and Epsom Railway at Epsom to the town of Portsmouth, to be called 'The Direct London and Portsmouth Railway;'" after reciting and incorporating therewith the Lands, Railways, and Companies' Clauses Consolidation Acts, it was, amongst other things, enacted, that the railway should

about one month before their powers for taking land compulsorily had expired, in consequence of an agreement with another Railway Company, they determined, with the assent of the majority of the shareholders present at an extraordinary general meeting, convened for that purpose, to complete four miles of the railway, as far as L., and delivered notices and entered into contracts for the purchase of land required for that purpose.

The plaintiff then filed his bill on behalf of himself and other shareholders, against the directors, praying an injunction.

Demurrer for want of equity overruled, and an order for an injunction to restrain the defendants from proceeding with their works, &c., with the view of completing the line to L. *only*, issued.

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be completed within five years from the passing of the special Act, and on the expiration of such period the powers by the special Act, or the said recited Acts, granted to the Company for executing the railway, or otherwise in relation thereto, should cease to be exercised except as to so much of the railway as should then be completed.

No period was prescribed by the special Act for the time at which the powers of the Company to take land compulsorily should cease; but, by the Lands Clauses Consolidation Act, sect. 123, it is enacted, that, if no period be prescribed, the powers of the promoters of the undertakers for the compulsory purchase or taking of lands for the purposes of the special Act, should not be exercised after the expiration of three years from the passing of the special Act.

The special Act received the Royal assent on the 26th of June, 1846; consequently, the powers of the Company for taking land compulsorily would expire on the 26th of June, 1849.

A call of 5*l.* 5*s.* per share had been made on the shareholders, but no steps had been taken for commencing the line, and a proposition for abandoning the project altogether was discussed at a meeting of the shareholders.

On the 18th of May, an advertisement was issued by the directors of the Company, for an extraordinary general meeting, to take into consideration a proposal by the London and Brighton Company, that the Direct Portsmouth Company should, on certain conditions, make their line in continuation of the Croydon and Epsom Railway as far as Leatherhead.

On the 12th of June following the meeting took place, and an arrangement was entered into with the London and Brighton Railway for the formation of the line as far as Leatherhead, and an agreement was also concluded as to the tolls payable by the Brighton Company for the use of the line.

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On the 1st of June, the plaintiff, who was an original shareholder in the Direct Portsmouth Company, filed his bill on behalf of himself and all the proprietors of shares in the direct London and Portsmouth Company, against the directors and the Company, stating certain meetings of the Company and the proceedings thereat, and alleging that it appeared by the proceedings at such meetings, and was the fact, that the Company and the directors had long since abandoned all intention to make, in pursuance of their special Act, and as thereby authorised, a railway from the Croydon and Epsom Railway, commencing by a junction therewith in the parish of Epsom in the county of Surrey to the parish of Portsea in or near to the town of Portsmouth, which was a distance of fifty-six miles; but that the directors had had under consideration a plan for making a railway from the Croydon and Epsom Railway, commencing by a junction therewith in the parish of Epsom, and terminating at or near Leatherhead in the county of Surrey, the same being a distance of four miles only; that the Company and directors had taken no proceedings whatever for the exercise of their compulsory powers of taking or purchasing any lands situate between Leatherhead and Portsmouth; and the period within which such powers might be exercised was so nearly expired, that it had become almost, if not quite, impracticable to take and purchase such lands between the two places as would be necessary for the purpose of the undertaking if the whole line were to be formed; that it appeared, by what took place at the last general meeting, that the plan of making a railway from Epsom to Leatherhead only, had then been given up and abandoned by the directors; but the plaintiff had lately discovered, as the fact was, that the directors had, since the last general meeting, revived the aforesaid plan, and that they intended to make such railway from Epsom to Leatherhead only, and to apply the monies of the Company for that purpose; and that they

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had entered into an arrangement with the London, Brighton, and South Coast Railway Company for the working, by the last-mentioned Company, of such railway, when made, on payment of certain tolls. The bill submitted, that the defendants were not authorised by their Act to make a railway from Epsom to Leatherhead only; and that, to make the same and apply the monies of the Company to that purpose, instead of making the entire railway, would be illegal; and that such illegality affected in common the interests of the plaintiff and all the other shareholders; and that the said plan was incapable of being lawfully executed by the Company, or authorised or sanctioned by the shareholders.

The bill further set forth the advertisement issued by the directors on the 18th of May, and it alleged that the directors intended, on behalf of the Company, forthwith to take and purchase such lands situate between Epsom and Leatherhead as were required for forming the proposed railway from Epsom to Leatherhead, and to enter, on behalf of the Company, into agreements for the purchase thereof with the owners of such lands, and to take other proceedings for effecting such purchases, and also to enter into and sign contracts and agreements for the purpose of causing the said proposed railway from Epsom to Leatherhead to be made; and it prayed that it might be declared, that it was not within the powers of the Company to make the proposed railway from Epsom to Leatherhead only; and that the funds of the Company could not lawfully be applied for that purpose; and that the directors, their agents, servants, and workmen, might be restrained by injunction from making the proposed railway from Epsom to Leatherhead only, and also from applying any of the funds of the Company for that purpose; and that they might also be restrained from taking or purchasing, on behalf of the Company, any lands for the purpose of making such proposed railway, and also from entering,

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on behalf of the Company, into any agreement for the purchase of any such lands, and from taking any other steps or proceedings for effecting any such purchase or purchases; and that they might in like manner be restrained from entering into or signing, on behalf of the Company, any contract or agreement, with any contractor or other person or persons, for or concerning the said proposed railway from Epsom to Leatherhead only, or the works thereof, or any portion of such railway or works to be constructed or executed; and that the Direct London and Portsmouth Railway Company might in like manner be restrained from sanctioning the aforesaid toll arrangement mentioned in the advertisement of the 18th of May.

To this bill the defendants put in a general demurrer for want of equity. The plaintiffs also gave notice of an application for an injunction in the terms of the prayer of the bill. The demurrer was first heard.

Mr. *Malins* and Mr. *Bovill*, in support of the demurrer.—It cannot be said that the powers of the Company to make the entire line are yet exhausted. The Company may serve notices on all the landholders before the day on which their powers expire, or they may, by application to Parliament, obtain an extension of those powers, or, by agreement with the landowners on the line, complete the proposed undertaking within the time limited by their Act, two years of which are unexpired.

At all events, what they are now doing must be considered a furtherance of the project. The shareholder, as a member of the Company, is bound to advance the scheme, and he cannot be heard to say, that because he has altered his opinion, or has interests adverse to it, the formation of the line is therefore to be stopped.

The public may compel the completion of the line by mandamus: *Regina* v. *The Eastern Counties Railway*(*a*);

(*a*) Ante, Vol. 1, p. 509.

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and if the relief by injunction sought by this bill is granted, there would be a conflict between the Court of law and the Court of equity. If the directors are not acting in excess of the powers conferred on them by the Legislature, this Court will not interfere: *Frewin* v. *Lewis*(*a*), *Foss* v. *Harbottle*(*b*), *Lord* v. *The Copper Miners' Company*(*c*), *Mosley* v. *Alston*(*d*). The powers of the Company do not cease under their Act, until June 1851; and there can be no equity to restrain them from the exercise of those powers until the time had expired. If the relief sought by the bill were granted, the Act of Parliament would, in effect, be repealed. There is a great distinction between the shareholders and the public, and this distinction is shewn by the cases of *Agar* v. *The Regent's Canal Company*(*e*), and *Salmon* v. *Randall*(*f*); no injunction was there granted to restrain the Company from prosecuting their works, so far as they could do so, without reference to the landowner. The plaintiff had neither shewn the impossibility of completing the railway, nor that he would suffer any injury by its noncompletion.

They also cited *Brocklebank* v. *The Whitehaven Railway Company*(*g*), *Ware* v. *The Grand Junction Waterworks Company*(*h*); and in order to shew that the Court will not interfere where confessedly the Companies are carrying out only a part of their project, they cited *Cooper* v. *The Shropshire Union Railway Company*(*i*).

Mr. *Turner* and Mr. *Cole*, in support of the bill.—What the Company are doing is clearly contrary to the intention of the Legislature; and the object of the bill is to compel the Company to keep within their powers: *Cole-*

(*a*) 4 My. & Cr. 249.
(*b*) 2 Hare, 462.
(*c*) 2 Ph. 740.
(*d*) 1 Ph. 790.
(*e*) In note to *Mayor of Lynn* v. *Pemberton*, 1 Swanst. 244.
(*f*) 3 My. & Cr. 439.
(*g*) Ante, p. 373.
(*h*) 2 Russ. & My. 470.
(*i*) 13 Jur. 443. This case is in the press, and will appear in the next Number of these Reports.

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man v. *The Eastern Counties Railway Company*(*a*). It is not denied by the affidavits that the present intention of the directors is to complete the line only as far as Leatherhead, which is not the object contemplated by the Act. There is, properly, no distinction to be drawn between the shareholder and the landowner: they are both interested in the project contemplated by the Act, and no other. The landowner is required to give up his land, the shareholder his money, for the one sole purpose of completing the communication between London and Portsmouth; but even if this were not so, this Court will not permit the Company to proceed in an undertaking merely in the expectation that no opposition will be given by the landowners, any one of whom, it is admitted, may prevent the further prosecution of the scheme. It is quite clear that the Company cannot complete the line with the funds which they now command, nor without an extension of their powers; and this Court will assume jurisdiction to prevent them from proceeding in the meanwhile, until they have obtained the means of completing the whole undertaking: *Blakemore* v. *The Glamorganshire Canal Company* (*b*), *Preston* v. *The Grand Collier Dock Company*(*c*), *Ward* v. *The Society of Attornies*(*d*), *Lee* v. *Milner*(*e*), *Gray* v. *The Liverpool and Bury Railway Company*(*f*).

Mr. *Malins* replied.

Lord LANGDALE, M. R.—This case seems to be, shortly, as follows:—The defendants are the Direct London and Portsmouth Railway Company and the directors of the Company. The Company is constituted under an Act of Parliament enabling the parties to construct a railway from a place near Epsom to Portsmouth, with the usual

(*a*) Ante, Vol. 4, p. 513.
(*b*) 1 My. & K. 164.
(*c*) 11 Sim. 327.
(*d*) 1 Coll. 370.
(*e*) 2 Y. & C. Ex. Ca. 611.
(*f*) Ante, Vol. 4, p. 235.

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powers of raising capital in shares, and taking the land required for making the railway. It was enacted, that the Lands Clauses Consolidation Act of 1845 should be incorporated in the Act; and, moreover, that certain specific communications should be completed within three years from the passing of the Act. The Act received the Royal assent on the 26th June, 1846. The plaintiff was an original subscriber to the undertaking, and is now entitled to seventy-one shares in the Company. A considerable sum of money has been subscribed, but no part of the line of railway has yet been made or commenced; and the bill alleges —in my opinion with sufficient distinctness—that the Company and the directors have abandoned all intention of constructing the railway from near Epsom to Portsmouth, which is a distance of fifty-six miles, and have determined to make a railway which shall extend from near Epsom to Leatherhead only, being a distance of about four miles. The bill alleges that it was and is the duty of the defendants to construct the whole railway in consideration of which the Act was passed and its powers given; and that, to apply the funds of the corporation to the construction of only a part of the railway is illegal; and it prays a declaration, that it is not within the powers of the Company to make the proposed railway from near Epsom to Leatherhead only, and that the funds of the Company cannot be lawfully applied for that purpose. It then prays for an injunction.

To this bill the defendants have put in a general demurrer. They must, therefore, be held to admit the facts stated, and to insist that the persons who govern the Company have a right, under their Act, to make as much or as little as they please of the whole railway, and to apply the capital, raised by the subscriptions of the shareholders, in constructing so much of the railway as they think proper. I apprehend it, however, to be perfectly clear, that the powers given by these Acts are given only in the contemplation of the supposed public good to

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be obtained from the completion of the whole work authorised, and that it never is or can be deemed to be intended that the powers would have been given on any less consideration, or on any less obligation on the parties to whom they are so given. There are two classes of persons who may be affected by any deviation from this principle, viz. the owners of the land over which the line is to pass, and the shareholders who have subscribed their money for the work. In the case of *Salmon* v. *Randall* (*a*), the present *Lord Chancellor* said, the principle laid down by Lord *Eldon*, in *Agar* v. *The Regent's Canal Company*, did not apply to the case then under his consideration; and he commented on its inapplicability, and some other circumstances which he particularly mentioned, but he stated the principle as one which might be extremely important in its application; and that the ground of it was, that where Acts of Parliament imposed certain severe burthens on individuals, by interfering with their private rights and private property, for the purpose of obtaining some great public good, if the Court sees that the undertaking cannot be completed, and therefore that the public cannot derive that benefit which was to be the equivalent for the sacrifice made by the individuals, the Court will protect the individuals from being compelled to make the sacrifice under the circumstances, until it appears the public will derive the proposed benefit from it.

On this principle, I conceive, the Court is to interfere, when it sees, at the proper time and in proper circumstances, that the undertaking cannot be completed, and that the protection due to the owners of land called on to make such sacrifice for the public benefit is to be afforded. The interference and protection are not to be made or afforded upon surmises or conjectures, or upon occasion or in a manner in any way inconsistent with the powers given by Parliament with reference to circum-

(*a*) 3 My. & Cr. 439.

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stances existing when the Act passed, but only on circumstances arising subsequently to the Act, in which it clearly appears that the object which Parliament had in view cannot be obtained, and that the consideration for which private rights were intended to be sacrificed has failed. But it is said that no such protection ought to be afforded to the shareholders, who are bound by the acts of the Company of which they are members. Happily, on this occasion, I have no need to talk of gambling speculations, of the cheats and dupes who have become so notorious. I may, at this time, reasonably assume that all parties have been and are acting bonâ fide. The plaintiff is a person who has subscribed and paid his money, no doubt on the faith of an undertaking sanctioned by Parliament on the ground of its being expected and intended to produce public benefit by its completion. His object may be his own particular benefit, but his advances are made on a scheme, the whole of which must be considered as that which alone has been approved and authorised by Parliament, which is to be conducted and managed in the way approved by Parliament, for the end proposed by Parliament, and for no other end, and the governing body of which must be considered to have entered into the obligation to complete the work authorised. It is on these expectations that the shareholders become members; and I am of opinion that they are entitled to have these expectations realised, if they can be. The Company is not like a partnership for general trading—a partnership in which one portion of the business may be encouraged, and another discouraged or abandoned, according to the contingencies of trade, and in which there is a general authority to use the capital to the best advantage; but it is a partnership for a public purpose, for effecting a work which it is a duty to complete, and for which alone the capital is advanced in shares, or authorised to be raised. The obligation to complete the work appears to me to be co-extensive with the authority to make it. Neither this Act nor any of these Acts contains

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authority to substitute a less work, or part, for the whole; and if the governors or directors of the Company take on themselves to determine that they will not perform the whole work, but will apply the capital, collected on the faith of the whole work being completed, in completing only a part of it, I am of opinion that the determination is without authority, and contrary to the provisions of the Act of Parliament.

I am of opinion that the act is illegal as against the landowners; and if there were no sufficient reason for saying that it is also illegal as against the shareholders, I should be glad to have an answer to the question put in the course of the argument—why are the directors to be at liberty to involve the shareholders in an illegality, and the consequences of an illegality, towards the landowners? I need not speak of the consequences of allowing such authority as is claimed here. It is plain, that, if it were allowed, some of the shareholders might defeat the authorised intention of all the rest, founded on the authority of Parliament, and apply the funds in a manner quite different from, and even contrary to, the intention of the contributors. On this occasion there is no controversy as to facts. The powers are given for the whole work. The directors have, as I must now take it, determined to perform only a part of the work; and I am of opinion that the shareholders are not bound by that determination, and that there is or may be a right to relief in this Court; and, therefore, I must overrule this demurrer.

The demurrer being overruled, the motion for an injunction stood over to enable the Company to file affidavits in opposition. A joint affidavit was filed by the chairman and Mr. Parsons, the solicitor of the Company, who, among other things, stated that early in the year 1847, the Company had served notices on various landowners on the line of the railway, and entered into contracts with others; and that, in the then present year, notices had been served on all the

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landowners between Leatherhead and Epsom, through whose lands the line of the railway was intended to pass, and who had not previously been served with such notices requiring their lands for the purposes of the railway. And that, in many instances, such lands had been actually purchased and paid for by the Company, and they had entered into possession. And that, in a great many cases, the Company had entered into contracts with the landowners, at prices fixed by such contracts. And that agreements had been entered into in some cases, to refer the price of the land to arbitration. And that such contracts and agreements had all been entered into and reduced into writing before the filing of the bill. That the directors had entered into a contract for the works, for the formation of the line of railway between Leatherhead and Epsom; and had also purchased land between Gomshall and Havant, and had purchased a valuable estate at Havant, belonging to the Duchess of Cleveland. That, in the early part of 1848, the directors applied to the commissioners of railways for an extension of the time for the compulsory purchase of land, but such application was refused. That no determination had been come to by the directors or shareholders, not to make the whole line to Portsmouth, but that it was then impracticable, in consequence of the financial state of the Company. That the proposed continuation of the line would be beneficial to the shareholders, and was much desired by the inhabitants of Leatherhead. That it was extremely probable that the whole line would eventually be completed. That the directors had entered into an agreement with the Brighton and Chichester Railway Company, whereby they had agreed to give up the formation of the line between Havant and Portsmouth, to the Brighton Company, with liberty for the Direct Portsmouth Company to use it. That, without an extension of the compulsory powers, the Company might by agreement purchase the land necessary for the formation of the line between Leatherhead and Havant.

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On the 1st of June, the plaintiff, who was an original shareholder in the Direct Portsmouth Company, filed his bill on behalf of himself and all the proprietors of shares in the direct London and Portsmouth Company, against the directors and the Company, stating certain meetings of the Company and the proceedings thereat, and alleging that it appeared by the proceedings at such meetings, and was the fact, that the Company and the directors had long since abandoned all intention to make, in pursuance of their special Act, and as thereby authorised, a railway from the Croydon and Epsom Railway, commencing by a junction therewith in the parish of Epsom in the county of Surrey to the parish of Portsea in or near to the town of Portsmouth, which was a distance of fifty-six miles; but that the directors had had under consideration a plan for making a railway from the Croydon and Epsom Railway, commencing by a junction therewith in the parish of Epsom, and terminating at or near Leatherhead in the county of Surrey, the same being a distance of four miles only; that the Company and directors had taken no proceedings whatever for the exercise of their compulsory powers of taking or purchasing any lands situate between Leatherhead and Portsmouth; and the period within which such powers might be exercised was so nearly expired, that it had become almost, if not quite, impracticable to take and purchase such lands between the two places as would be necessary for the purpose of the undertaking if the whole line were to be formed; that it appeared, by what took place at the last general meeting, that the plan of making a railway from Epsom to Leatherhead only, had then been given up and abandoned by the directors; but the plaintiff had lately discovered, as the fact was, that the directors had, since the last general meeting, revived the aforesaid plan, and that they intended to make such railway from Epsom to Leatherhead only, and to apply the monies of the Company for that purpose; and that they

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had entered into an arrangement with the London, Brighton, and South Coast Railway Company for the working, by the last-mentioned Company, of such railway, when made, on payment of certain tolls. The bill submitted, that the defendants were not authorised by their Act to make a railway from Epsom to Leatherhead only; and that, to make the same and apply the monies of the Company to that purpose, instead of making the entire railway, would be illegal; and that such illegality affected in common the interests of the plaintiff and all the other shareholders; and that the said plan was incapable of being lawfully executed by the Company, or authorised or sanctioned by the shareholders.

The bill further set forth the advertisement issued by the directors on the 18th of May, and it alleged that the directors intended, on behalf of the Company, forthwith to take and purchase such lands situate between Epsom and Leatherhead as were required for forming the proposed railway from Epsom to Leatherhead, and to enter, on behalf of the Company, into agreements for the purchase thereof with the owners of such lands, and to take other proceedings for effecting such purchases, and also to enter into and sign contracts and agreements for the purpose of causing the said proposed railway from Epsom to Leatherhead to be made; and it prayed that it might be declared, that it was not within the powers of the Company to make the proposed railway from Epsom to Leatherhead only; and that the funds of the Company could not lawfully be applied for that purpose; and that the directors, their agents, servants, and workmen, might be restrained by injunction from making the proposed railway from Epsom to Leatherhead only, and also from applying any of the funds of the Company for that purpose; and that they might also be restrained from taking or purchasing, on behalf of the Company, any lands for the purpose of making such proposed railway, and also from entering,

on behalf of the Company, into any agreement for the purchase of any such lands, and from taking any other steps or proceedings for effecting any such purchase or purchases; and that they might in like manner be restrained from entering into or signing, on behalf of the Company, any contract or agreement, with any contractor or other person or persons, for or concerning the said proposed railway from Epsom to Leatherhead only, or the works thereof, or any portion of such railway or works to be constructed or executed; and that the Direct London and Portsmouth Railway Company might in like manner be restrained from sanctioning the aforesaid toll arrangement mentioned in the advertisement of the 18th of May.

To this bill the defendants put in a general demurrer for want of equity. The plaintiffs also gave notice of an application for an injunction in the terms of the prayer of the bill. The demurrer was first heard.

Mr. *Malins* and Mr. *Bovill*, in support of the demurrer.—It cannot be said that the powers of the Company to make the entire line are yet exhausted. The Company may serve notices on all the landholders before the day on which their powers expire, or they may, by application to Parliament, obtain an extension of those powers, or, by agreement with the landowners on the line, complete the proposed undertaking within the time limited by their Act, two years of which are unexpired.

At all events, what they are now doing must be considered a furtherance of the project. The shareholder, as a member of the Company, is bound to advance the scheme, and he cannot be heard to say, that because he has altered his opinion, or has interests adverse to it, the formation of the line is therefore to be stopped.

The public may compel the completion of the line by mandamus: *Regina* v. *The Eastern Counties Railway*(*a*);

(*a*) Ante, Vol. 1, p. 509.

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of the conditions on which he became a shareholder, that the capital, or any part of the capital, of which he is a shareholder, should be applied in the construction of a railway from Epsom to Leatherhead only. What is the answer? No statement is made that the Company has or expects to obtain the means of constructing the whole line, or now intends to apply the capital or funds, which have been subscribed for the whole line, in or towards completing the whole line. But Mr. Parsons states very distinctly how much has been done in the way of preparing for the construction of the railway from Epsom to Leatherhead, and also states some things from which, though it is not distinctly stated, it is, as I collect from a subsequent part of the affidavit, meant to be suggested that something has been done which may in some way contribute towards the construction of parts of the line between Leatherhead and Portsmouth. Mr. Parsons also states, that, in his opinion, it is at this time quite practicable to take and purchase such lands between Leatherhead and Portsmouth, as would be necessary for the purpose of the undertaking, if the whole line were to be formed. It is difficult not to infer from this mode of expression, that Mr. Parsons does not think that the whole line is to be formed. Mr. Wilkinson states his opinion to be, that the formation of the whole line would be a great public benefit; and he says that neither the Company nor the directors have determined not to make the railway from Epsom to Portsmouth, although, from the circumstances of the times and financial considerations, it has not been possible to proceed in or towards the making of it otherwise than as before stated by Mr. Parsons—i. e., as I understand it, further than in making preparations for constructing the railway from Epsom to Leatherhead, and doing the other acts mentioned by Mr. Parsons, and to which I have referred. He then states, that the construction of the railway to the extent and in the manner in which it is now proposed to be constructed

—i. e., I repeat, as I understand it, from Epsom to Leatherhead only—will, in his opinion, be very beneficial to the interests of the shareholders, and that it is much desired by the inhabitants of Leatherhead and the districts adjoining; and, without suggesting that the Company has or is likely to overcome the difficulties which have made it impossible to proceed otherwise than as before stated, he says he thinks it very probable that the whole of the said Direct London and Portsmouth Railway, or some railway in the same line, will be made at some future period.

In this affidavit, much which is not said is, I conceive, designedly left to inference and presumption; and if I should unfortunately come to an erroneous conclusion upon the evidence produced, I shall very sincerely regret that the defendants have not thought fit to express themselves more clearly; but upon this affidavit, considering not only what is said, but also what is omitted to be said, and which I must presume would have been said if it could have been said truly, I think myself obliged to conclude, that at the present time the Company have neither the intention nor the means, nor any probability of obtaining the means, of completing the whole line, under the powers they now possess. They seem to have the means and intention to complete a part only, and they think their doing so would be advantageous to the shareholders.

Granting that to be so, I am of opinion, that, without the authority of another Act of Parliament, they have no right to apply the capital, subscribed for the whole line, to that limited purpose. The powers of this Act of Parliament were not given, nor did the shareholders subscribe their capital, merely to enable the Company to make profit, though for the benefit of the subscribers themselves; nor to complete a particular portion of the work, neglecting the rest, merely because that particular portion is much desired by the inhabitants of Leatherhead and its vicinity; nor merely upon the chance, that, by some means or other, the whole line authorised

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by the Act, or some other line, will or may be made at some future time. But the terms and conditions of the Parliamentary work are otherwise defined, and the powers given are to be exercised in making and completing the whole line from Epsom to Portsmouth, and only for that purpose; and as the defendants now, when the proper occasion seems to me to have arisen, are unable or unwilling to say that they are applying, or intend to apply, the funds or capital of the Company now in their possession for or towards that entire purpose, I am of opinion that I should neglect my own duty if I did not grant an injunction to restrain them, not, indeed, in the words asked for in the notice of motion, but in the terms which appear to me proper from the nature of the case. I propose, therefore, to order as follows:—Let an injunction issue to restrain the defendants from applying the capital and funds of the Direct London and Portsmouth Railway Company, or any part thereof, in or towards the construction of a railway from the Croydon and Epsom Railway, commencing by a junction therewith in the parish of Epsom, to Leatherhead, in the county of Surrey, only, or any otherwise than for the purpose and with the view of making and completing the said railway from the said Croydon and Epsom Railway as aforesaid, to the parish of Portsea, in or near the town of Portsmouth, in the county of Southampton, pursuant to the powers now vested or hereafter to be vested in them by Parliament.

Nov. 6th. The defendants now moved before the *Lord Chancellor*, by way of appeal, to discharge the order of the Master of the Rolls.

The case was argued by the same counsel as in the Court below.

It was also urged by Mr. *Malins*, that the plaintiff had stood by and seen the Company enter into agreements with the owners of land, and that in fact he was not entitled

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to any relief, in consequence of his acquiescence in the acts done.

The LORD CHANCELLOR (without calling on Mr. *Rolt* and Mr. *Cole*, who appeared for the plaintiff, in opposition to the motion)—The principle that parties are not at liberty to apply monies for purposes distinct from those for which they were subscribed, is often acted on in this Court, and there are numerous authorities in support of it. The only question here is, whether the purposes to which the defendants intend to apply the Company's capital and funds, are distinct from those for which they were subscribed.

A person may have subscribed his money, on the belief that a railway from London to Portsmouth may prove a good speculation; but it does not follow that he may form the same opinion of one from London to Leatherhead.

It cannot be said that the construction of part of the line is the purpose for which a shareholder subscribed to a project for making an entire line.

The injunction carefully avoids restraining the defendants from doing anything which is in part execution of the whole line; but it has been argued as if the injunction granted were an interference by the Court with the legal powers of the Company; this is not so, for the injunction leaves the Company in the full exercise of their legal powers.

The cases in which I have declined to interfere, are those in which the acts complained of were within the strict letter of the corporate powers of the Company.

The case for a mandamus by the Court of Queen's Bench to compel the Company to complete their line, is founded upon the contract created by their Act between them and the public. The case for the injunction is made by the contract entered into by the Company with the individual shareholders.

The only part of the case on which I feel any difficulty, is the plaintiff's alleged acquiescence in the acts of the di-

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rectors in 1848, when it was stated that the Company did not intend to carry on the work beyond the line from Epsom to Leatherhead. It appears that the plaintiff stood by and allowed the Company to be embarrassed by contracts subsequently entered into with landowners.

Mr. *Rolt*.—That case was not made in the Court below, and is unsupported by evidence. The plaintiff, on the contrary, swears that he was not aware of the intention to limit the line to Leatherhead until sixteen days before the bill was filed.

The LORD CHANCELLOR.—As there is no evidence of such alleged acquiescence, I must discharge the appeal motion, with costs.

On the 24th July, 1848, the plaintiff in the suit presented a petition under the 11 & 12 Vict. c. 45 (the Winding up Act) praying that the Company be dissolved and their affairs wound up; but before the hearing of the petition, the Act of the 12 & 13 Vict. c. 108, passed, whereby it was provided that the 11 & 12 Vict. should not apply "to Railway Companies incorporated by Act of Parliament."

Nov. 8*th*.

As the petition could not be proceeded with, it was now mentioned on the question of costs. The Master of the Rolls observed, that, as no blame could attach to either party, the petition must be dismissed, without costs.

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The Great Western Railway Company entered into an agreement with two other Companies, A. and B., (which agreement was sanctioned by three-fifths of the then shareholders of the A. and B. Companies,) to purchase their lines, under a power of sale contained in their Acts; and it was a term of that agreement, that the A. and B. Companies should apply to Parliament for powers to amalgamate their lines, and that the directors of the Great Western Railway should have certain powers as to the manner of making the lines and controlling the expenditure. In consequence of the transfer of shares to persons not favourable to this agreement, resolutions were afterwards passed, by which it appeared, that it was the desire of the majority of the then shareholders of the A. and B. Companies to repudiate the agreement with the Great Western Company; and they refused to make the application to Parliament, and to oppose it if made by the directors, pursuant to the agreement.

The Great Western Railway Company then filed a bill for the specific performance of the agreement, and at the same time applied for an injunction to restrain the dissentient shareholders of the A. and B. Companies from entering into any agreement with any other Company, or doing any act in violation of their original agreement.

Held, by the Lord Chancellor, affirming the judgment of the Vice-Chancellor of England, that there was a sufficient case shown by the bill to support it against a demurrer for want of equity.

That an agreement to apply to Parliament for powers to do something, not included in a particular Act, is such an agreement as the Court will recognise to the extent of compelling the parties to keep matters *in statu quo* until the application to Parliament be made.

That an agreement, not in itself invalid, made by the majority of the shareholders, cannot be rescinded by resolutions passed by persons afterwards becoming shareholders, although they may then constitute the majority.

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ALLOTMENT.

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ALLOTTEE.

See CALLS, 2.
DEPOSIT.

1. U. applied for shares in a projected Company, and ten were allotted to him, on which a deposit of *5l. 5s.* was to be paid on the 9th of October. He paid the deposit on the day appointed, and obtained the banker's receipt, but did not then, or afterwards, execute the parliamentary deeds or subscription contract, and consequently no scrip was delivered to him. The projected Company was declared bankrupt, and U. applied to prove for the amount of the deposit. The proof was admitted by the commissioner, whereupon the assignees appealed to the Vice-Chancellor. The respondent, U., having failed to prove that he was prevented from executing the deeds, or from obtaining his scrip, by any act of the Company, or that any fraud had been exercised on him by the Company:—*Held*, that the proof must be expunged. *Ex parte Clarke, Re The Tring, Reading, and Basingstoke Railway Company*—Ch. 394

2. The Companies Clauses Consolidation Act, which was incorporated with the Company's, enacts (sect. 8), that every person who shall have subscribed to the capital of the Company, and whose name shall be entered on the register, shall be deemed a shareholder; (sect. 9), that the Company shall keep a book, in which shall be entered the names of those entitled to shares; (sect. 14), that every shareholder may transfer his shares by deed; (sect. 15), that such deed shall be delivered to the secretary, and that, until such transfer shall be so delivered, the vendor of the share shall continue liable to the Company for any call that may be made upon such share. The defendant subscribed for shares in the undertaking, and was, without his consent, inserted on the register; he received scrip, and subsequently sold them:—*Held*, that he continued liable for calls so long as his name remained on the register.

Semble, the effect of a sale of scrip is to transfer an equitable title to the purchaser, to have the shares assigned to him, and his name entered on the register as a shareholder. *The Midland Great Western Railway Company* v. *Gordon*, 76

ARBITRATION.

See COSTS, 7.
WINDING-UP ACT, 8.

1. The owner of a mansion-house and lands entered into an agreement with the promoters of a projected Company, whereby it was stipulated that the value of the land to be taken, and of residential and other damage, should be referred to arbitration, and "all proper communications, archways, drains, &c., made in such places and in such mode as might be decided by the arbitrators;" and the reference was to be subject to the powers of the Railways, Lands, and Companies Clauses Consolidation Acts. These heads of agreement were afterwards reduced into a formal document, and signed by the solicitors of the Company. The Company afterwards proceeded to give notices under the usual forms prescribed by the Acts, requiring the plaintiff to submit his claims, but the plaintiff disregarded such notices.

On the 23rd of February the Company appointed their arbitrator, and on the 9th of March the plaintiff also

appointed his arbitrator. On the 29th of March the two arbitrators appointed an umpire, who made his award on the 28th of June, wherein no mention was made of the communications, &c. The Company, having paid the amount into the bank, proceeded to enter upon the land, when the plaintiff filed his bill, and obtained an ex parte injunction, and at the same time moved to set aside the award, on the grounds —first, that the award was not made within the time limited by the 23rd section of 8 Vict. c. 18; and, secondly, that it did not include all the matters submitted to arbitration.

Held, by the Lord Chancellor, overruling the judgment of *Wigram*, V. C., that the time mentioned in the Act means, in the case of an umpire being appointed, three months from the date of such appointment, and not three months from the date of the appointment of the arbitrators.

That, reference being made in the agreement to the Railway Clauses Consolidation Act, the umpire was not bound to include in his award matters which are specially provided for by that Act. *Re Skerratt and The North Staffordshire Railway Company*—Ch. 166

2. A. and B., whose wharf was about to be crossed by a railway, claimed a larger amount of compensation from the Company than they were willing to give, and the matter was referred to arbitration. The reference was opened, and the business proceeded, in the presence of all parties, on the first day, but on the following day the arbitrator of the Company failed to attend, and their solicitor protested in writing against proceeding in his absence. The arbitrator then present, and the umpire, who was also present, but whose time for acting had not commenced, sent a notice to the other arbitrator of their intention to proceed, and a witness was examined on behalf of A. & B., but no evidence was adduced by the Company. The Company gave notice to the arbitrators and the umpire not to make an award. The time within which the arbitrators were to make their award having expired, A. & B. called on the umpire to make his award, which he did without hearing any evidence except that given by the witness before mentioned. The Company thereupon moved to set aside the award:—*Held*, by the Lord Chancellor, affirming the decision of Vice-Chancellor *Knight Bruce*, that the award so made by the umpire, in the absence of and without notice to one of the parties, was invalid.

If the umpire had given notice to the Company of his intention to make his award, whether, when made, it would have been invalid, quære? *Re Hawley and The North Staffordshire Railway Company*—Ch. 383

3. On a submission to arbitration under the Lands Clauses Consolidation Act, it is the duty of the umpire, under the 34th section, to ascertain whether the claimant's right to costs arises, and of including them in his award, if it exists. He has no power to grant a subsequent certificate for them. *Re The London and North Western Railway Company, and Quick*, 520

4. Where a claim for compensation is referred, under the Lands Clauses Consolidation Act, there is no objection to the award assessing one sum for damage and price. The umpire awarded to the claimant one sum for the fee simple *in possession*, that being what the claimant, by his notice, claimed, though the premises were at that time under lease:—*Held*, that the compensation given was to be taken to be in respect of what he claimed, and was therefore sufficient as against the claimant; and that, if the tenants had any claim in respect of the actual possession, their remedy was against the

Company. The parties appointed two arbitrators, but they made no award, nor appointed any umpire under sect. 27 of the Act, within twenty-one days after the last appointment; after which time, the Board of Trade appointed an umpire, who made his award within three months of *his* appointment:—*Held*, that the appointment was valid, and that the award was made in due time, within sect. 23. *Semble*, the 49th sect. of that statute is directory. *Semble*, also, that it is not necessary, before moving to set aside the award, that it should be made a rule of Court, if the submission be. *Re The East and West India Docks and Birmingham Junction Railway Co. and Bradshaw*, 527

5. In a claim for compensation against a Railway Company, the party, by agreement, submitted the matter to arbitration instead of taking the verdict of a jury under the compensation clause of the Company's Act. The deed of reference and the award were silent as to costs:—*Held*, that, although the award was in favour of the claimant, the provisions of the Act with regard to costs did not apply. *Ex parte Reynal*, 60

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Under the 9 & 10 Vict. a meeting was called of the members of a projected Railway Company, who had failed in obtaining an Act, and, at such meeting, it was resolved that the Company be dissolved, but that such dissolution should not be an act of bankruptcy. Three of the committee of management afterwards met, and signed a declaration of bankruptcy, upon which a fiat issued against the Company. Two others of the committee then presented a petition to the Court of Review to annul the fiat, but did not serve any of the members:—*Held*, that some of the members who dissented from the views taken by the petitioners must be served with the petition.

That, as a provision of the subscribers' agreement required that five members should be present to form a quorum, the unanimous vote of three only did not satisfy the requisitions of the Acts of the 7th & 8th, and the 9th & 10th Vict.; and the fiat was annulled accordingly. *Ex parte Morrison, Re The London and Birmingham Extension Railway Company*—Ch. 224

BILL OF COSTS.

1. An attorney's bill of costs, addressed to the provisional committee of the Great Manchester, &c. Railway Company, of whom the defendant was one, was delivered to another member of the same committee, at his place of business:—*Held*, that this was not a delivery to the defendant, pursuant to the 6 & 7 Vict. c. 73, s. 37, and that the bill should have been delivered either at the place of business of the Company, or to some person who might reasonably be considered to represent the provisional committee. *Edwards* v. *Lawless*, 357

2. An action was brought by an attorney against a provisional committee-man, for the amount of his bill of costs. The offices of the Company

were in Moorgate-street, and upon the office-door was a plate, with their name on it. On the 5th of January, 1846, none of the deposits having been paid, the Company died a natural death, and it did not appear that the defendant was ever at the office after that date. On the 28th of September following, the plaintiff delivered his bill, directed to the Company, at the offices. The plate was then on the door, and the bill was given to a person who appeared to be a clerk.

Held, by *Wilde*, C. J., and *Williams*, J., that this was not a delivery of the plaintiff's bill at the defendant's office of business, pursuant to the 7 & 8 Vict. c. 73, s. 37.

And by *Coltman*, J., and *Maule*, J., contrà, that it was. *Blandy* v. *De Burgh*, 361

3. In an action by an attorney for his bill of costs, against a provisional committee-man of a Railway Company, to prove a delivery of the bill under the 6 & 7 Vict. c. 73, s. 37, the plaintiff proved that he inclosed his bill in a letter to the solicitor of the Company, and sent it to his house, and that the bill was afterwards laid before two meetings of the provisional committee, at one of which the defendant was present:—*Held*, sufficient. *Eggington* v. *Cumberledge*, 113

BILL IN PARLIAMENT.

See AGREEMENT.
DIRECTORS.

A Court of equity has jurisdiction, if a proper case connected with private property or interest be made, to restrain a party by injunction from petitioning against a bill in Parliament.

The Stockton Railway Company being leased to the Clarence Company, entered into an agreement for the sale of their railway to the Leeds Company, and it was a term of the agreement, that the purchase should be completed three weeks after an Act had passed for permitting the Leeds to amalgamate with the Clarence Railway Company.

It did not appear that any definite agreement was concluded between the Clarence and the Leeds Company, but it was understood that a bill should be presented by the Clarence Company for the amalgamation of the two Companies. The bill was presented, and passed the Commons without opposition, but in the Lords the Leeds Company presented a petition against the bill.

The Stockton Company, fearing that if this Act did not pass, they would lose the benefit of their contract, filed a bill against the two other Companies, praying an injunction to restrain the Leeds Company from opposing the bill in Parliament, and also specific performance of the agreement.

Held, by the Lord Chancellor, discharging the order of the Vice-Chancellor of England granting the injunction, that the Stockton Company had not made out such a case as to induce a Court of equity to exercise its jurisdiction by injunction. *The Stockton and Hartlepool Railway Company* v. *The Leeds and Thirsk and The Clarence Railway Companies*—Ch. 691

BOND (FORM OF).

1. A Railway Company, after fruitless negotiation, and after having given notice of their intention to summon a jury, under the 68th section of the Lands Clauses Consolidation Act, to settle the amount of compensation to be paid to A. and B., the tenants in common of a piece of land required for the purposes of their railway, proceeded to enter upon the land under the summary powers given by the 85th section of the same Act. They paid the determined value into the joint account of A. and B., and delivered a

bond conditioned for the payment on demand "to A. and B., heirs, executors, administrators, or assigns, or deposit on demand," &c., of such purchase-money or compensation as might be determined to be payable:—*Held*, that the payment and the bond given in the above form to persons tenants in common of land, although represented by one solicitor, and acting together, were irregular. That the words, "on demand," inserted in the condition for payment, was not a compliance with the terms of the 85th section of the Lands Clauses Consolidation Act.

Plaintiffs were five persons, three of whom were tenants in common, and two were devisees in trust for sale of land, the subject of the suit. Quære, whether there was not a misjoinder of plaintiffs? *Langham* v. *Great Northern Railway Company*—Ch. 263

2. A Railway Company gave a landowner notice of their intention to take portions of his land for the purposes of their railway, whereupon a treaty was commenced, pending which the Company, without notice to him, proceeded, under the 85th section of the Lands Clauses Consolidation Act, to have the lands valued, and caused a bond to be delivered conditioned for payment on demand of the purchase-money to the plaintiff, or for the deposit of the same on demand in the Bank; and on the bond was indorsed a receipt of the Accountant-General, by which he certified that he had received the sum mentioned in the bond, and had placed the same to the credit of "*Ex parte The Great Northern Railway Company the Account of T. P.*" The Company afterwards gave another notice, that they required certain lands, coloured yellow, under the 32nd section of the Railways Clauses Consolidation Act, for the temporary purposes mentioned therein generally, and without stating the particular purpose for which such lands were required.

Held, by the Vice-Chancellor of England, that, in the deed appointing a surveyor under the 58th section of the Lands Clauses Consolidation Act, it is not necessary that a description of the lands to be valued should be inserted. That, where lands are required by a Company for temporary purposes, the notices should specify the particular purpose for which such lands are required. That the words "on demand," inserted in a bond given by a Company to a landowner, under the 85th section of the above Act, renders such bond informal; and that the plaintiff was entitled to his injunction absolute.

Held, by the Lord Chancellor on appeal, that the bond in this case was informal; but he refused to grant an injunction absolute, limiting it to the time when a proper bond should have been delivered by the Company. *Poynder* v. *The Great Northern Railway Company*—Ch. 196

3. The defendant pleaded, fourthly, a justification, as servant of the London and South Western Railway Company, under the Lands Clauses Consolidation Act, 1845, and alleged that a bond had been given to the plaintiff, under the 85th section of that Act. That section requires, that, if the promoters of an undertaking should be desirous of entering any land before an agreement should have been come to with the party interested, a bond should be given to such party, conditioned for payment *to such party, or for deposit in the Bank for the benefit of the parties interested in such land, as the case may require*, under the provisions herein contained, all such purchase-money, &c. The bond given in evidence was conditioned to pay the plaintiff, "*her heirs, executors, administrators or assigns*, or to deposit in the Bank, *or otherwise, for the benefit of the parties interested*," &c., as the case may require, under the provisions contained

in the Lands Clauses Consolidation Act:—*Held*, that the introduction of the words "*or otherwise*," were not authorised by the Act, and that the bond was not, therefore, in compliance with it. *Semble*, that if the only objection had been, that, instead of being conditioned for payment to the plaintiff, it had been conditioned for payment to her, "her heirs, executors, administrators, or assigns," it might have been sufficient. *Hoskins* v. *Phillips*, 560

BRIDGE.

See COMPENSATION.
RAILWAY CLAUSES ACT.

BYE-LAW.

The 5 Will. 4, c. x, s. 106, empowered the Company to make bye-laws for the government of their affairs, and for the management of the undertaking and of their officers and servants, "and to impose and inflict such reasonable fines and forfeitures upon all persons offending against the same as to the said Company shall seem meet, not exceeding the sum of 5*l.* for any one offence; such fines and forfeitures to be levied and recovered as any penalty may by this Act be levied and recovered;" such bye-laws to be "binding upon and be observed by all parties," provided they were not repugnant to the laws of England, or the directions in the Act contained. Sect. 148 empowered the Company to make orders and regulations for regulating the travelling upon the railway, and for or relating to travellers passing thereon, to be binding upon such travellers, on pain of forfeiting a sum not exceeding 5*l.*, which the Company shall attach to a default; sect. 163 enacted, that the penalties and forfeitures inflicted by the Act, or by any bye-law, order, or rule made in pursuance thereof, might be recovered in a summary way by adjudication of justices, one half of the penalty to be paid to the informer, and the other half to the Company; sect. 165 authorised any officer of the Company to seize and detain any person whose name and residence should be unknown to such officer, *who should commit any offence against the Act*, and to convey him before a justice without any warrant or other authority than that Act. The Company made a bye-law that each passenger on booking his place should be furnished with a ticket, to be delivered up before leaving the Company's premises, and that each passenger not producing or delivering up his ticket on leaving the Company's premises should be required to pay the fare from the place whence the train originally started:—*Held*, that, assuming this to be a valid bye-law—of which quære?—it was not a bye-law imposing a penalty of forfeiture; therefore, that the non-production of a ticket by a passenger who had been furnished with one, on leaving the Company's premises, and his refusal to pay the fare from whence the train originally started, did not justify his arrest.

Semble, that the only power of apprehension given by sect. 165, is for penalties inflicted by or for offences committed against the Act. *Chilton* v. *The London and Croydon Railway Company*, 4

CALLS.

See ALLOTTEE, 2.
PLEADING, 1, 7.

1. A declaration in assumpsit stated, that on a certain day the plaintiffs had agreed with 200 other persons to endeavour to establish a Railway Company, and to obtain the necessary Act of Parliament; the capital, to be raised by shares of 20*l.* each, to be allotted by a committee of management, and a deposit of 2*l.* 2*s.* per share to be paid

by each allottee. That the plaintiffs being the committee of management, on &c., at the request of the defendant, allotted him thirty-five of the said shares, upon certain terms agreed upon between them, namely, the payment of the deposit by the defendant on a certain day to certain bankers. The declaration then averred mutual promises, the readiness and willingness of the plaintiffs to perform the terms on their part, and breach, the non-payment by the defendant of the deposit.

Held, first, on general demurrer, that the declaration was good, though it did not allege that the Company was provisionally registered, pursuant to the 7 & 8 Vict. c. 110, or that it was formed before the date of that Act.

Secondly, that the contract disclosed by the declaration was one upon which the plaintiffs might sue alone, without joining the other members of the Company.

Thirdly, held, on special demurrer, that the declaration was not bad for not alleging that the Company was continuing when the shares were allotted.

Nor, fourthly, for not shewing with sufficient certainty, that the defendant accepted the allotments.

Nor, fifthly, for not stating what the terms were which the plaintiffs promised to fulfil. *Duke* v. *Forbes*, 319

2. A call under the 8 & 9 Vict. c. 16, means an application to the shareholders for money. The resolution of the directors to make a call need not specify either the time or place of payment, though the directors must appoint a time and place, which must be notified to the shareholders by a notice, allowing them twenty-one days for payment. A transferee of scrip certificates of shares in a Railway Company is not liable for calls under the 8 & 9 Vict. c. 16, unless at the time of making the call his name be on the *sealed* register of the Company. Whether an original allottee would be liable, though his name be not on the sealed register, quære? Pursuant to a resolution of the directors, notice of a call was given to the shareholders, but no time or place of payment was provided by the resolution, though it was by the notice. In debt against a transferee of scrip shares who had claimed to be registered, and whose name had been entered on the *draft* register, but not on the *sealed* register of the Company:—*Held*, that, under the 8 & 9 Vict. c. 16, it was not a condition precedent that the same application should be made to each shareholder for the same portion of the sum originally subscribed, nor that the resolution should contain a direction as to the time and place of payment; it is sufficient if the time and place be notified to the shareholders twenty-one days before payment required. *The Newry and Enniskillen Railway Company* v. *Edmunds*, 275

3. *Semble*, per *Parke*, B., a call may be considered as made when a resolution to that effect has been passed by the directors and notified to the shareholders. *Shaw* v. *Rowley*, 47

4. A., the registered owner of certain shares in a Railway Company, sold the same by auction to B.; B. afterwards sold to C., but no transfer was executed, and A. remained the registered owner, and liable for calls:—*Held*, that B. was bound to do all acts necessary to relieve A. from liability in respect of the shares sold, and specific performance decreed, subject to a special reference as to title and amount of calls due. *Shaw* v. *Fisher*—Ch. 461

5. A Railway Company, indebted on mortgages to become due in future successive years, passed a resolution at a general meeting, that the sums required should be raised by the creation of new shares under the powers of their Act, and applied in satisfaction of the

mortgages as they respectively became due. Calls were made on the new shares to an amount more than sufficient to pay off the first of such mortgages; and before the second was payable, another call was made on the subscribers for the new shares, two of whom then filed a bill, alleging, that the calls were unnecessary; and that the directors intended to apply the money raised for other purposes than the payment of the mortgages:—

Demurrer of the Company, for want of equity, allowed. *Yetts* v. *The Norfolk Railway Company*—Ch. 487

6. Upon an auditâ querelâ to be relieved from a judgment, the writ set out a deed of settlement of a joint-stock company, by which it was agreed between the defendants and the shareholders, of which the plaintiff was one, that, upon the neglect of any shareholder to pay any call within one calendar month after notice, the directors might, at any time after the expiration of such calendar month, declare that such shares, as to which the full amount should not have been paid, should be forfeited; provided, that it should be lawful for the directors, if they should think fit, to enforce the payment of any call, &c., instead of declaring forfeited any share. It then stated, that the plaintiff having neglected to pay his calls, the defendants sued him, recovered judgment, and levied part of the amount of the calls, and that they afterwards declared his shares forfeited:—*Held*, that the power in the deed was in the alternative, and that, in case of non-payment of a call, the directors might either sue or declare the shares forfeited, but that they could not do both. That the proceeding to judgment and execution was an election by them of their remedy, and that the declaration afterwards, that the shares were forfeited, was a nullity; consequently, that the plaintiff was not entitled to be relieved from the judgment. *Giles* v. *Hutt*, 505

7. To debt for calls against a shareholder, the defendant pleaded, that he became the holder of the shares by subscription, and that at the time of his subscribing for the shares, and of the making of the calls, he was an infant, and whilst he was an infant he disaffirmed the contract and subscription, of which the plaintiffs then had notice, and that he then gave notice to the plaintiffs that he held the shares at their disposal:—*Held*, a good defence to the action.

Semble, first, that the word "subscriber" in the Companies Clauses Consolidation Act means, those persons who are capable of contracting; and, secondly, that such a contract entered into during infancy may be disaffirmed by the infant before or after his attaining his full age. *The Newry and Enniskillen Railway Company* v. *Combe*, 633

8. It is no defence to an action against a shareholder for calls, that at the time of making the calls the defendant was an infant; nor that at the time that the defendant became the holder of the shares he was an infant:—*Semble*, a plea of infancy to such an action ought to show that the defendant had repudiated the contract on his attaining his full age; his appearing by attorney is not equivalent to an averment that he had attained that age; nor is the plea a sufficient repudiation of the contract.—*Semble*, also, that the 8 & 9 Vict. c. 16, does not render all infant shareholders liable for costs. *The Leeds and Thirsk Railway Company* v. *Fearnley*, 644

CARRIERS' ACT.

Every person actually employed under the sanction of a carrier, to do what he has undertaken to do, is a servant in his employ, within the 8th section of the Carriers' Act (11 Geo. 4 & 1 Will. 4, c. 68).

A bale of silk was delivered at a country station of a Railway Company

to be delivered to the plaintiff in London. It arrived at the London terminus of the Company, and was there placed by the Company's servants in a van of C. & H., who were employed by the Company to deliver all goods arriving at that terminus. The van was under the charge of J., a porter of C. & H., and by him and others the bale was stolen. The Company were in the habit of sending a delivery ticket with each parcel, which ticket was headed with the Company's name, and signed C. & H., and gave a list of porters, including J., and stating that any servant of the Company taking more than therein stated, would be dismissed:—*Held*, that J. was a servant in the employ of the Company, within the 8th section of the Carriers Act.

Semble, that the delivery ticket did not operate by way of estoppel against the Company, that J. was their servant. *Machu* v. *The London and South Western Railway Company*, 302

COMMITTEE (LIABILITY OF MEMBERS).

See PRINCIPAL AND AGENT, 2. PROVISIONAL COMMITTEE. PLEADING, 5.

1. In assumpsit against A., B., and C., three members of a committee of a proposed Company, for not accepting or paying for machinery, for goods bargained and sold, and on an account stated, it appeared that the committee, of which A. and B. were members, had ordered the machinery, under a written contract, prior to the time of C.'s joining the Company. By the terms of the contract, the plaintiff was to be allowed to draw such sums monthly as he wished, not exceeding the price of the work done. Subsequently C. joined the Company, and became one of the committee, and during that time, as the work progressed, advances were made according to the terms of the contract. C. took an active part in making experiments and suggesting alterations in the works, and on one occasion promised payment:—*Held*, first, that as C. was not liable on the special contract, he being no party to it, there was no ground for implying a second and new contract, to which C. was a party, from his having united in giving directions about the machinery, or from his subsequent promise of payment, or from his having afterwards acquired an interest in the subject-matter of the contract, and therefore that the plaintiff was not entitled to recover on the count for goods bargained and sold; secondly, that C.'s promise of payment being without consideration, and the promise of him only, was insufficient to support the account stated; thirdly, that by the payments on account the property did not pass to all the defendants, for, if it did pass, it was according to the contract under which the payments were made, and to that C. was not a party. *Beale* v. *Moule*, 105

2. In assumpsit against one of the provisional committee of a Railway Company, for advertising the prospectuses of the Company, it appeared, that there was a provisional committee and a committee of management; that the advertisements were ordered by the committee of management, of which the defendant was not a member; that the prospectus issued by the Company contained a clause that, "until the Act shall be obtained, the affairs of the Company shall be under the control of the committee of management for the time being, to whom power is given to allot the shares, and to *apply the funds* of the Company for all the expenses incurred in the formation of the Company," &c.; the jury having found a verdict for the defendant:—*Held*, that the managing committee had no authority, either express or implied, to pledge the credit of the provisional committee, and that the

verdict was right. *Dawson* v. *Morrison*, 62

3. The plaintiff, one of the registered promoters of a Railway Company provisionally registered, at a meeting of the provisional committee was appointed secretary, and other persons, of whom the defendant was one, managing committee of the Company. The proceedings at this meeting were subsequently confirmed by the defendant:—*Held*, that upon these facts, there was no evidence for the jury of a personal contract with the defendant, and that, the plaintiff and defendant being co-contractors, the former could not recover from the latter for wages as a secretary. *Wilson* v. *Viscount Curzon*, 24

4. In an action of assumpsit by surveyors, for work and labour, against two of the provisional committee of a proposed railway Company, the Judge directed the jury, that, before they found a verdict for the plaintiffs, they must be satisfied that the defendants did themselves personally, or by their agent at the time actually authorised in that behalf, employ the plaintiffs to do the work, or that some other person not authorised, but assuming to act for them, the defendants, as their agent, had employed the plaintiffs, and that the defendants had afterwards been informed of, and had ratified such retainer:—*Held*, that such direction was correct. *Nevins* v. *Henderson*, 684

COMPANIES CLAUSES ACT.

See ALLOTEEE, 2.
PLEADING, 1.

COMPENSATION.

See LANDS CLAUSES ACT.

In an action by a passenger against a Railway Company, for compensation on account of injuries sustained by the breaking down of a bridge on the line, alleged to have been improperly made, but which had been constructed under the superintendence of a competent engineer, the Judge directed the jury, that the question for them to consider was, whether the bridge had been constructed and maintained with sufficient care and skill, and of reasonably proper strength with regard to the purposes for which it was made:—*Held*, that the direction was right.

Semble—In such case, the mere employment of a competent engineer would not exonerate the defendants, unless he had used reasonable care and proper materials in the construction of the works. *Grote* v. *The Chester and Holyhead Railway Company*, 649

COMPULSORY POWERS.

1. After fruitless negotiations by a Railway Company with a landowner for the purchase of his land, they summoned a jury to assess the value. The jury met, but, before they delivered their verdict, the time within which, under the 220th section of their Act, the powers of the Company to take land compulsorily were to be exercised, expired:—*Held*, by the Vice-Chancellor, that under the terms of the 220th section, the landowner was entitled to an injunction to restrain the Company from depositing the amount found by the verdict, and from issuing any precept to the sheriff to deliver possession.

Held, by the Lord Chancellor, on motion to dissolve the injunction, that the question, as to the expiration of the Company's powers, was a purely legal one; that, pending the decision by a Court of law, the injunction granted by the Vice-Chancellor of England be continued, it appearing that the balance of injury, if the Company were permitted to proceed in the meanwhile, would be on the side of the landowner. *Brocklebank* v. *The Whitehaven Junction Railway Company*—Ch. 373

2. A Railway Company were empowered by their Act, with which the Consolidated Acts were incorporated, to make and maintain "the railway and works" on the line, and in the manner thereby provided. The Company proceeded to take, under their compulsory powers, the whole of a strip of land numbered in the plans, part of which was more than 100 yards distant from the lines intended to be laid down, alleging that it was required, not only for these lines, but also for the general purposes of the traffic:—*Held*, by the Lord Chancellor, dissolving an injunction granted by his Honor Vice-Chancellor *Wigram*, that, under the powers of the Act, the Company were authorised to take the whole of such land for the general purposes of their Act, although a small portion only was required for the lines of rail.

That, in cases where the question is, whether parties are or are not exceeding their powers, the injunction should not merely prohibit them generally from doing what they have no authority to do, but should define the limits of the authority within which they are authorised to act. *Cother* v. *The Midland Railway Company*—Ch. 187

CONSTRUCTION OF STATUTES.

See STATUTES (CONSTRUCTION OF).

CONTRACT.

See CALLS, 7.
COMMITTEE, 1, 3.
DIRECTORS.
SHARES, 2.
SPECIFIC PERFORMANCE.
STAMP, 2.

1. The defendant applied, by letter, to a projected Railway Company for 100 shares, undertaking to accept the same, or any less number, and to pay the deposits. He received a letter of allotment for sixty shares. This letter was headed "Not transferable." In an action by the Company against the defendant, to recover the amount of the deposits:—*Held*, that there was no binding contract, the proposal being absolute, and the acceptance conditional, it containing a qualification that the contract was not to be transferable. *Duke* v. *Andrews*, 496

2. If there be at a particular place an established usage in the manner of dealing and making contracts, a person who is employed to deal or make a contract there has an implied authority to act in the usual way. The plaintiff, a sharebroker at Liverpool, at the request of the defendant, who resided at Oldham, sold for him scrip shares to C., a Liverpool broker, which were not delivered on the day agreed upon, and C. in consequence bought other scrip at the market price, and then claimed and received from the plaintiff the difference between the contract and the market price. It was the usage amongst brokers at Liverpool to be responsible to each other upon such contracts, of which usage the defendant was cognizant:—*Held*, that the defendant was liable for such difference.

Semble, per *Parke* and *Rolfe*, Bs., that he would be bound by such usage, though he might not be cognizant of it. *Bayliffe* v. *Butterworth*, 283

3. The plaintiff, a sharebroker at Leeds, bought for the defendant ten railway shares, to be paid for on delivery. The defendant not being ready to pay when the scrip was delivered to the plaintiff, the vendors demanded of the plaintiff the money or the scrip. He re-delivered the scrip, which had fallen in price, to the vendors, who sold them for the then market price, and, according to the custom of the Leeds Stock Exchange, called upon the plaintiff to pay the difference, which he, without communicating with the defendant, did, by al-

lowing the same in account:—*Held*, that the plaintiff might recover that difference from the defendant in an action for money paid.

Semble, that a party who employs a broker at a particular place to purchase shares, is bound by a usage affecting the broker at that particular place. *Pollock* v. *Stables*, 352

4. The defendants, who were sharebrokers, on the 30th of August, 1845, bought for the plaintiff, also a sharebroker, thirty-eight T. shares, at 2*l.* 8*s.* 6*d.* per share, for the next account day (15th of September), and sent him an advice note to that effect. The 2*l.* 8*s.* 6*d.* was premium, and did not include the deposit, none being then paid, the scrip not having been issued. By the custom of brokers, if the deposit is paid before the account day, it is added to the price. The defendants subsequently paid the deposits to the vendors. On the 19th of September, the defendants sent in their account to the plaintiff, but, by mistake, omitted to charge him with the amount of the deposits; the plaintiff sold the shares at 2*l.* 8*s.* 6*d.* per share, and at that rate was paid.

On the 18th of September, the defendants bought for the plaintiff eighty S. shares, at 4*l.* 10*s.* per share, which did not include the deposit, and sent him an advice note with that sum as the price. The defendants subsequently paid the vendors the amount of deposit, 200*l.* On the 26th of September, the defendants sold the shares for the plaintiff at 7*l.* per share, which included the deposit; and in the accounts rendered to the plaintiff by the defendants, he was credited with the amount, but was only debited with the premium. The plaintiff acted as broker for other parties, and settled with them upon the footing of the advice notes, and of the prices charged in those notes, being the full price of the shares.

Held, that the defendants were entitled to set off the amounts paid by them for deposits, and were not concluded by their omission, by mistake, to charge him with those payments. *Dails* v. *Lloyd*, 572

5. One hundred railway shares were bought by the defendants of the plaintiffs, on the 15th, to be paid for on the 31st of October. On the 14th of October a call was made upon the shares. On the 1st of November the plaintiffs applied to the defendants for a name to be inserted in the deed of transfer. The defendants refused to give one, and finally declined to accept the shares. The plaintiffs had not paid the call upon the shares. The 8 Vict. c. 16, s. 16, prohibits the transfer of shares on which any calls are unpaid.

The plaintiffs sued the defendants for not accepting, or paying for, the shares. On an issue whether the plaintiffs were ready and willing to transfer the shares:—*Held*, that the plaintiffs were entitled to the verdict on that issue, they being in a condition to transfer at any time by paying the calls. *Shaw* v. *Rowley*, 47

6. The defendants, sharebrokers, pursuant to the orders of the plaintiff, purchased for him, in their own names, railway scrip for the next account-day (29th August); on the 26th of August the plaintiff transmitted to the defendants the purchase-money, and requested them to forward him the scrip. The Company had called in the scrip for registration on the 22nd of August, and the sealed certificates were not issued until December, and in the meantime a call was made, which was necessarily paid by the vendors. The plaintiff, in December, being called on to take up the shares and pay the amount of call, and 30*s.* for stamp, repudiated the transaction, on the ground "that it fell within his province to pay the call when and how he pleased, and without being subject to 30*s.* expenses," and the shares were resold at a loss,

which was paid to the vendors by the defendants. In assumpsit for money had and received, to recover back the original purchase-money:—*Held*, that the contract was for the delivery of scrip on the 29th of August, if not then called in, otherwise of share certificates, as soon as they should be issued, and that the action was not maintainable. *M'Ewen* v. *Woods*, 335

7. A sharebroker employed to purchase shares does not thereby undertake to procure them absolutely, but only to use due and reasonable diligence to endeavour to do so.

The plaintiff, on the 30th of September, employed the defendants, sharebrokers at M., to procure scrip, and paid them the price. By the usage of the Stock Exchange at M., there are two settling days in each month, on which all share transactions are settled, although in some cases settlements are not enforced on those days. The next settling day after the 30th of September was the 14th of October. The scrip had been issued before the 14th, but none had reached M. before that day. The shares not being delivered on that day, the plaintiff rescinded the contract, and then sued the defendants for a return of the purchase-money. The Judge directed the jury, that, if they thought that fourteen days had been fixed by usage as a reasonable time, the plaintiff was entitled to recover; the jury having found a verdict for the plaintiff:—*Held*, that the direction was right, and that the plaintiff might recover in an action for money had and received. *Fletcher* v. *Marshall*, 340

CONTRIBUTORY.

See WINDING-UP ACT.

COPYHOLDS.

By the 33 Geo. 3, c. 80, the Company were empowered to purchase land for the purposes of their canal. Section 9 enacted, that it should be lawful for all bodies corporate, trustees, &c., for themselves, their heirs, and successors, and for their cestui que trust, and for every other person or persons whomsoever, who should be seised, possessed of, or interested in any lands, &c., set out for the purposes of the canal, to sell or convey the same unto the Company, and such conveyance should be made according to a certain form; then followed a form whereby the vendor granted and released all his right, &c., in the same to the Company for ever, by virtue and according to the true intent and meaning of the Act; and it was enacted, that every such conveyance should be valid. Sect. 10 provided, that if the parties should not agree as to the price, it should be settled by certain commissioners, or by a jury. Sect. 30 enacted, that the commissioners should settle what proportion of the purchase-money, or compensation for damage, should be allowed to any tenant or other person having a particular interest in the premises, with due regard to the rights of the lord of any manor.

A., a copyholder in fee, conveyed part of his copyhold lands to the Company, by deed, in the statutory form, the lord being no party to it:—*Held*, that the conveyance transferred all that A. could transfer without the lord, and that the lord's rights remained unaffected; and *semble*, that sect. 30 was meant to apply only to cases where the lord joined in the conveyance. *Dimes* v. *The Grand Junction Canal Company*, 34

COSTS.

See ARBITRATION 3, 5.
BILL OF COSTS.
DIVIDENDS, 15.
STAYING PROCEEDINGS.

1. A piece of land, part of certain trust estates, was taken by a Railway Company, and the purchase-money

deposited in Court. Other part of the same estates was subject to a mortgage. The tenant for life presented a petition, praying that the sum deposited might be applied in payment of the mortgage debt, and that the residue might be invested:—*Held*, that the Railway Company were not, under the 161st section of their Act, liable for the costs of the mortgage. *Ex parte Yeates, Re The Lancaster and Carlisle Railway Company*—Ch. 370

2. A Railway Company, in order to enter upon land under the 85th section of the Lands Clauses Consolidation Act, gave to the owners a bond, and deposited the estimated value of the land according to the provisions of that Act. They afterwards paid the amount found by a jury to be the value of the land, and obtained a conveyance from the owners, and thereupon petitioned for the payment out to them of the sum deposited. The owners opposed the petition, on the ground that the costs of ascertaining the value, and of the conveyance, and of a suit occasioned by the Company, had not been satisfied:—*Held*, by the Lord Chancellor, reversing the order of the Vice-Chancellor of England, that, upon the construction of the 80th and 85th clauses of the Lands Clauses Consolidation Act, the Company were entitled to the payment out to them of their deposit, and that the owners of the land had no lien on the deposit for such costs. *Ex parte The Great Northern Railway Company*—Ch. 269

3. Where a Railway Company had paid the estimated value of a piece of land into Court, and afterwards concluded the purchase by contract, the Court will order the payment out to the Company of the sum deposited, without service on the vendor, on production of an affidavit that his costs, according to the Act, had been discharged. *Ex parte The Eastern Counties Railway Company*—Ch. 210

4. The costs of an application for the interim investment of a sum of money paid by a Railway Company for the purchase of lands taken by them under the powers of their Act from a corporate body:—*Held*, upon the special construction of the Act, not to be payable by the Company. *Ex parte Worcester College, Oxford, Re Birmingham Railway Company*—Ch. 147

5. Where a suit has been instituted to establish the right of a person claiming a sum in Court, the proceeds of land taken by a Railway Company, the Court will, on application for payment of the fund, order the costs of the person entitled, but not those of the other parties to the suit, to be paid by the Company. *In re Hore's Estate and The South Devon Railway Company*—Ch. 592

6. Under the London and Birmingham Act, the costs of a second re-investment in land, and of the conveyance and petition, allowed, and 14*l.* residue of money in Court ordered to be paid to the petitioner for his own use. *Ex parte The Rector of Loughton, Re The London and Birmingham Railway Company Act*—Ch. 591

7. A petition was presented by a landowner, praying that a sum of money deposited in Court for the purchase of certain lands taken by a Railway Company, might be paid out to him, and that the costs of that application, and of conveyance, and of furnishing abstracts of title, &c., might be paid to him by the Company.

The Company opposed that part of the prayer which asked for costs, on the ground that the petitioner had wilfully refused to receive the sum found by an award to be the value of the land, when tendered to him, and had neglected to make out his title when required by the Company so to do.

The petitioner having stated by

affidavit that he conscientiously believed the award to be invalid, and that the question had been argued and decided at law after a long argument:—*Held*, that such a refusal was not a "wilful" refusal within the meaning of the 80th section of the Lands Clauses Consolidation Act. *Ex parte Bradshaw, Re The East and West India Docks and Birmingham Junction Railway Act, and the Lands Clauses Consolidation Act*—Ch. 432

8. Under the construction of the 69th section of the Lands Clauses Consolidation Act, a purchase made and completed previous to a reference to the Master will not, although it be afterwards approved by the Master, be a purchase within the meaning of the Act, so as to entitle the petitioner to his costs. *Ex parte Bouverie*—Ch. 431

9. A Railway Company, after fruitless negotiations with a landowner, deposited the value and entered into possession of his land. The price was afterwards settled by arbitration, and paid by the Company, who then applied by petition to have the sum deposited in Court paid out to them. The landowner claimed a lien on the deposit, for his costs of negotiation and conveyance:—*Held*, by the Lord Chancellor, discharging the order of the Vice-Chancellor of England, that he was not entitled to such lien, and the order was made as prayed by the petition. *Re The London and South-Western Railway Metropolitan Extension Act, Ex parte Stevens*—Ch. 437

10. Parties to certain pending suits petitioned to have a sum of money, which had been paid into Court by a Railway Company, invested in trust, in the suits, and also to have the dividends invested and accumulated. Several of the parties to the suit appeared by their counsel, to consent.

Held, that the Railway Company was bound to pay the costs of all. *Re The Hull and Selby Railway Company*—Ch. 458

11. The power of settling costs, given to the Master by the 52nd section of the Lands Clauses Consolidation Act, (8 & 9 Vict. c. 18,) invests him with the character of an original arbitrator, and there is no review of his decision. *Re Ross and The York, Newcastle, and Berwick Railway Company*—Ch. 516

12. Under the provisions of the North Midland Railway Act, the Company must pay the costs of the parties applying for payment out of Court of a sum of money which had been paid in for land taken by the Company, and invested. *Ex parte Slaters, Devisees, Re The North Midland Railway Act*—Ch. 700

DAMAGES.

See COMPENSATION.
PLEADING, 4.

1. In detinue for scrip shares, where it appeared that after action brought and before verdict, the scrip had been delivered up to the plaintiff:—*Held*, that the jury might, as a measure of damages, take into consideration the difference in value of the scrip shares between the time of the demand and refusal, and the time of the delivery of them to the plaintiff, and that in such case the jury might find the facts specially, and confine themselves to an assessment of damages for the detention. *Williams* v. *Archer*, 289

2. The defendant purchased scrip railway shares of the plaintiffs, at 25*s.* premium on the 20th of October; but the scrip were not issued till the 24th. On the 21st of that month the shares fell to 14*s.* premium. At six in the evening of that day, the defendant gave notice to the plaintiffs that he should not take the shares. On the 22nd the shares had fallen to 8*s.* premium,

and continued to fall until the 6th of December, when the plaintiffs, after notice to the defendant, sold them at 17*s.* discount. In an action for not accepting or paying for the shares:—*Held*, that the measure of damages was the difference in the price of the shares between the 20th and 22nd of October. *Pott* v. *Flather*, 85

DEMURRER.

See CALLS, 5.
PLEADING, 2, 3, 5, 6, 7.
PROVISIONAL COMMITTEE.

DEPOSIT.

See CONTRACT, 2.
COSTS, 1, 2, 3, 7, 9.
PLEADING, 2.
WINDING-UP ACT, 2.

1. An allottee of shares in a Company paid his deposit to the Company's bankers, and received from them the following receipt:—"Received 100*l.*, to be placed to the account of W. C., &c.; for Messrs. Jones, Loyd, & Co. 100*l.* (signed) A. Palmer.—This receipt not transferable. The party to whom these shares are allotted is requested to attend immediately at the offices of the Company, with this receipt, to sign the parliamentary contract, when the receipt will be exchanged for the shares." In an action by the allottee to recover back the deposit, the scheme having been abandoned:—*Held*, 1st, that this document was a receipt for money deposited in the hands of a banker, to be accounted for on demand, within the exemption of the 55 Geo. 3, c. 184, and did not require a stamp; 2ndly, that the plaintiff was bound to produce the letter of allotment, or to give secondary evidence of its contents, in order that the Court might see what the terms of the contract were under which the deposit was made. *Clarke* v. *Chaplin*, 294

2. An allottee of shares in a Railway Company, provisionally registered, the prospectus of which stated the capital to be 1,500,000*l.*, in 60,000 shares, duly signed the subscribers' agreement authorising a disposition of the deposits; at that time 35,000 shares only had been allotted, on 18,160 of which deposits had been paid, although the time for payment of the deposits had expired. These facts were not communicated to the plaintiff when he executed the subscribers' agreement. The scheme having proved abortive:—*Held*, in an action to recover a return of the deposits, that the suppression of the above facts did not amount to fraud, so as to avoid the subscribers' agreement. *Vane* v. *Cobbold*, 299

3. An applicant for shares in a projected Railway Company received a letter of allotment in the usual form, on which was indorsed, amongst other things, as follows:—"The directors assume the right to carry out their intentions by the adoption of all such measures as they may deem requisite for obtaining the necessary parliamentary powers to form a Company for the construction of the Railway, &c., and to apply the amount paid for deposits in discharge of any liabilities incurred by them, under the general powers vested in them for the prosecution of the undertaking." The undertaking having failed, in an action by the allottee against one of the directors for a return of his deposits:—*Held*, that the directors must be understood as saying, "we shall apply the deposits in such manner as we think fit for the purpose of carrying the undertaking into effect, and in discharge of any liability we may thereby incur." That the term "general powers" meant those then vested in the directors, which they assumed for the purpose of carrying the undertaking into effect; and that they had a right

to apply the deposits for advertisements, surveys, and necessary plans to be deposited at the Board of Trade. That if there had been any question as to the reasonableness of the application of the deposits, it ought to have been left to the jury. That the directors were bound to return any sum expended after it was clear that the undertaking could not go on. *Jones* v. *Harrison*, 138

4. The plaintiff applied for and had allotted to him twenty shares in a Railway Company provisionally registered. He paid the deposit of 2*l.* 12*s.* 6*d.* per share, and signed the subscribers' agreement, which empowered the provisional directors to carry on or abandon the whole or any part of the project, and out of the monies which should come to their hands, by way of deposit or otherwise, to make the necessary parliamentary deposits, and generally to pay all other costs and expenses which they might incur with respect to the project. The scheme proved abortive, and the Company was dissolved under 9 & 10 Vict. c. 28. In an action for money had and received against the defendant, one of the provisional committee, to recover back the deposit:—*Held*, that the plaintiff, by executing the subscribers' agreement, had authorised the directors to expend the deposit, and could not therefore recover it back. *Garwood* v. *Ede*, 134

5. The plaintiff, by a letter, containing the usual undertaking to sign the parliamentary contract and subscribers' agreement, applied for shares in a Railway Company provisionally registered. He never signed the parliamentary contract or subscribers' agreement, nor received any letter of allotment, but he paid the deposit and received the scrip certificates for 500 shares. The certificates were in the usual form, and stated that "the parliamentary contract and subscribers' agreement had been signed by the person to whom the certificate was issued." The scheme proved abortive. In an action against one of the managing committee to recover back the deposit:—*Held*, that the plaintiff had put himself in the same position as if he had signed the parliamentary contract and subscribers' agreement. *Clements* v. *Todd*, 132

DETINUE.

See DAMAGES, 1.

DIRECTORS.

See DEPOSIT, 4, 5.
INJUNCTION, 2.

1. At a general meeting of the shareholders of a Railway Company, a resolution passed, "That the directors be and are hereby authorised, to borrow on mortgage, bond, or otherwise, such sums, for such periods, and at such rates of interest, as they may deem expedient, in accordance with the provisions of the deed of settlement and Act of Parliament." At a meeting of the directors, three of that body offered to advance a sum of money on security of the calls and of the property of the Company. The Company thereupon gave an authority to the bankers to hold all sums paid on account of calls to the credit of the lenders; but before all the sums advanced had been repaid, the Company withdrew that authority. The lenders then filed their bill, praying an account, a receiver, and payment of their balance. To this bill the Company put in a general demurrer, for want of equity.

It was not alleged that the agreement for the loan had been submitted to a general meeting of the shareholders, in accordance with the 29th section of the Joint-stock Companies Registration Act:—*Held*, that the contract was invalid, and demurrer ac-

cordingly allowed, with liberty to amend.

The property of the Company consisted of mines and collieries, and the rate of interest reserved was 7*l.* per cent. Quære, whether the contract was not invalid on this ground also? *Feversham* v. *Cameron's Steam, Coal, and Railway Company*—Ch. 492

2. The defendant subscribed to an undertaking for a railway from D. to M. and A., with a branch to L., and signed the subscribers' agreement, by which it was declared, that the directors should have power to complete the railway and branch, or any part, and all such other works as therein mentioned, and for that purpose to select and fix upon, and from time to time to alter and vary, the sites or spots at or over which the said intended railway or branch thereof respectively should commence, extend, or terminate, and also the intermediate course or courses thereof. That the directors should make such application to Parliament for carrying into operation all or any of the purposes aforesaid, or any portion thereof, as the directors should think proper.

The directors applied to Parliament, and obtained an Act, for a railway from D. to M. and L., which, amongst other things, empowered the Company to purchase a canal, and bound them to maintain it for the purpose of navigation:—*Held*, that the directors were authorised in applying for and accepting such an Act.

That the scheme subscribed for, and that for which the Act was obtained, were identical. *The Midland Great Western Railway Company* v. *Gordon*, 76

3. In 1837, certain persons projected the India Steam Ship Company. Prospectuses were issued, containing, amongst other names, that of the defendant as a director. The defendant attended at the board-room as a director, and official papers were sent thence to his residence, from October, 1837, to March, 1838, but not subsequently. In July, 1838, the Company obtained their Act, in which the defendant was named as a director. In July, 1839, a memorial was inrolled, but it did not contain the defendant's name, nor did he execute the Company's deed, although his name was inserted as a director. In November, 1843, a judgment was signed against the secretary in an action begun on the 15th of April, 1840.

Held, that these facts did not establish that the defendant was a member of the Company at the time of the judgment. *Scott* v. *Berkeley*, 51

DIVIDENDS.

See INVESTMENT.
PURCHASE-MONEY.

In order to avoid future applications to the Court, an order was made on petition, for payment of dividends arising from purchase-money of land attached to the archbishopric of Canterbury, and taken by a Railway Company, to the archbishop for the time being, and the Company were ordered to pay the costs of the petition. *Ex parte The Archbishop of Canterbury, Re The East Lincolnshire Railway Company*—Ch. 699

DOCUMENTS.

See INSPECTION OF DOCUMENTS.

EXECUTION.

See DIRECTOR, 3.
PRACTICE, 7, 8.

The 68th section of the 7 & 8 Vict. c. 110, empowers the Court or a Judge to give leave to a judgment creditor of a Joint-stock Company to issue execution against any shareholder without any suggestion or scire facias. *Peart* v. *The Universal Salvage Company*, 347

FORFEITURE.

See CALLS, 6.

FORGERY.

A railway scrip certificate, in the usual form, is not an accountable receipt, nor an acquittance or receipt within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 10, and the forgery of it does not amount to felony, but to a misdemeanor at common law only. *Clark* v. *Newsam*, 69

FRAUD.

See DEPOSIT, 2, 3.

INDEMNITY.

See PLEADING, 5.

INFANT.

See CALLS, 7, 8.

INJUNCTION.

See AGREEMENT.
BILL IN PARLIAMENT.
COMPULSORY POWERS, 1, 2.
LANDS CLAUSES ACT, 3, 4.
SHAREHOLDER.
STATUTES (CONSTRUCTION OF), 4.

1. A Railway Company gave notice that they required ten parcels of land, on one of which was a brine-pit and steam-engine connected with certain salt-works. The parties could not agree upon the price. The Company then caused a valuation to be made of eight out of the ten parcels; they deposited the determined sum, and gave a bond under their corporate seal, but without sureties, and entered upon the eight parcels, under the 85th section of the Lands Clauses Act. The plaintiffs then filed their bill stating these facts, and praying an injunction to restrain the Company from entering on the two pieces of land not included in the valuation, and also from entering upon or continuing in possession of the other eight pieces until they had paid the purchase-money and compensation for their interest in all the lands comprised in the notice. Vice-Chancellor *Knight Bruce* granted the injunction as prayed. The Company then made a further valuation of the two pieces of land omitted in the former valuation, deposited the determined sum in addition to the former amount, and delivered a new bond with sureties. They then moved before the Lord Chancellor to discharge the order for the injunction:—*Held*, affirming the decision of Vice-Chancellor *Knight Bruce*, that the injunction had been rightly granted; that the appeal motion could not be sustained by the subsequent proceedings of the Company; and it was dismissed with costs. The Company moved, before Vice-Chancellor *Knight Bruce*, to dissolve the injunction, when the plaintiffs alleged, that the subsequent proceedings of the Company were not a compliance with the requisitions of the Act; and his Honor, being of that opinion, dismissed the motion accordingly:—*Held*, by the Lord Chancellor, on appeal, that the motion stand over, with liberty to the plaintiffs to bring their objections to the subsequent proceedings of the Company by supplemental bill.

The Company gave notice of their intention to summon a jury to assess the value.

The plaintiffs then filed a supplemental bill bringing the new case before the Court, by which they alleged that the premises about to be taken were part of a manufactory, and praying the continuance of the former injunction, and also an injunction to restrain the Company from issuing a warrant to summon a jury to assess the value of less than the whole manu-

factory. The Vice-Chancellor continued the original injunction, and granted a new injunction, according to the prayer of the supplemental bill: —*Held*, by the Lord Chancellor, discharging part of the order of Vice-Chancellor *Knight Bruce*, that the injunction granted by him on the supplemental bill be dissolved. That parties are not entitled to the benefit of the extraordinary interference of the Court by injunction, who, when they might bring forward their whole case at once, bring forward a part only, and when that fails, re-model their bill and rely on an entirely different equity. *Barker* v. *The North Staffordshire Railway Company*—Ch. 401

2. A Railway Company was promoted, and the Act obtained, with the view of the line being constructed on the broad gauge, and negotiations for a lease to the Great Western Railway Company were entered into, with the sanction of the Legislature and of the then shareholders. Before, however, these negotiations had been carried into effect, a change took place in the sentiments of the shareholders, by means, as it was alleged, of large purchases of shares by the South Western Railway Company, who thereby acquired the majority of votes, and the control over the new Company. The chairman, and six out of the ten directors, however, refused to carry out the wishes of the majority, whereupon the three directors filed a bill, praying an injunction against the seven directors. The seven directors then moved to have this bill taken off the file, and subsequently applied to have an injunction, obtained against them ex parte, dissolved:—

Held, by the Lord Chancellor, affirming the judgment of his Honor the Vice-Chancellor of England, that the decision of the Court on the motion should stand over until an opportunity had been given to the shareholders to express their opinion as to the objects of the bill.

And, *held*, by the Vice-Chancellor of England, that a motion to dissolve the injunction, obtained ex parte, be dissolved, with costs. *The Exeter and Crediton Railway Company* v. *Buller* —Ch. 211

3. An action was commenced at law by a surveyor, against a Railway Company, to recover a balance due to him for services performed. Payments had been made on account. Three months after the action was at issue, the Company filed their bill, praying discovery and an injunction, on the ground that, from the complicity and mutuality of the accounts, they ought to be taken under the direction of a Court of equity:—*Held*, by the Lord Chancellor, affirming the decision of the Vice-Chancellor of England, on motion by the Company for an injunction to restrain the action, that this was not a case in which a Court of equity will exercise the jurisdiction which it assumes in matters of account concurrently with the Courts of law; and that no precise rule exists as to the particular cases in which it will exercise such jurisdiction.

That the Court will in all cases be influenced by any unexplained delay on the part of the plaintiff in equity.

The judgment in the case of *Nixon* v. *Taff Vale Railway* considered. *South Eastern Railway Company* v. *Martin*—Ch. 478

INJURY.

See COMPENSATION.

INSPECTION OF DOCUMENTS.

Where a member of the managing committee of a Railway Company undertakes to wind up their affairs, and, by his attornies, who were also the attornies of the Company, possessed

himself of the deeds of the Company: —*Held*, that he is bound to grant an inspection of them to any one of the members, at all reasonable times, and that it is no answer to an application for such inspection, that the solicitors claim a lien on them. *Lee* v. *Barlow*, 1

INVESTMENT.

See COSTS, 4, 6.
DIVIDENDS.
PURCHASE-MONEY.

The Court will not, under the 70th sect. of the Lands Clauses Consolidation Act, make an order for the interim investment of purchase-money deposited in Court by a Railway Company on mortgage securities. *Ex parte Franklyn, Re The Great Northern Railway Company*—Ch. 206

JOINT-STOCK COMPANIES ACT.

See PRACTICE, 7, 8.
SHARES, 1.

JUDGMENT AS IN CASE OF NONSUIT.

A rule for judgment as in case of a nonsuit having been obtained in an action against an allottee of shares for the non-payment of deposits, the Court, upon an affidavit stating the pendency of another cause between the plaintiffs and another defendant, which had been turned into a special case, and wherein the principal questions of law and fact raised in this action would, as the defendant believed, be decided, enlarged the rule, the plaintiff undertaking to be bound by the result of the special case. *Duke* v. *Tucker*, 116

JURISDICTION.

See AGREEMENT.
BILL IN PARLIAMENT.
LANDS CLAUSES ACT.
SPECIFIC PERFORMANCE.
STATUTES, 3.

LAND—LANDOWNER.

See BOND, 2.
COMPULSORY POWERS, 1, 2.
COSTS, 3, 5, 8, 9.

LANDS CLAUSES CONSOLIDATION ACT.

See ARBITRATION, 1, 3, 4.
BOND, 1, 2.
COSTS, 2, 7, 8, 10, 11.
INJUNCTION, 1.
INVESTMENT.
MANDAMUS.
PURCHASE-MONEY, 3.
SPECIFIC PERFORMANCE.
STATUTES (CONSTRUCTION OF), 3.

1. The lessee of certain land and the reversioner entered into a joint agreement with a Railway Company for the sale of their entire interest in certain messuages required by the Company. An application by the lessee to have the gross sum, which had been paid into Court by the Company, apportioned between himself and the reversioner, under the 7th sect. of the Lands Clauses Consolidation Act, refused. *Ex parte Ward, Re The Midland Railway Company*—Ch. 398

2. The directions in the 39th sect. of the 8 & 9 Vict. c. 19, requiring inquisitions to be held before coroners, where sheriffs are interested, were introduced for the protection of the party against whom the interest would operate, and may be waived by him. Therefore, where a Railway Company issued their warrant to a sheriff to summon a jury to assess compensa-

tion under the 8 & 9 Vict. c. 18, and the under-sheriff, before whom the inquisition was to be held, previous to the inquiry, informed the landowner that he was a shareholder in the Company, and the landowner made no objection until the verdict had been given:—*Held*, that he had elected to waive the protection of the statute. *Ex parte Baddeley*, 542

3. A Railway Company had power under their Act to stop up a certain street, on providing another road, which was to become "a public highway." The Company formed their railway on an embankment which crossed the street in question, and made another road, which compelled the inhabitants of the street to make a considerable circuit in order to reach the town of B.

The defendant, the owner of houses and property in the street so stopped, which were at a distance of fifty yards from the railway, and were not included in the Railway Act, gave the Company notice, in the terms of the 68th section of the Lands Clauses Act, of his claim for compensation, on the ground that his property had been injuriously affected by the formation of the railway.

The Company thereupon filed their bill, praying an injunction to restrain the defendant from proceeding under that section.

Held, by the Lord Chancellor, reversing the decision of the Vice-Chancellor of England, that, as the right of the defendant to compensation was not clearly established, and that, if he were allowed to proceed under the 68th section, two proceedings, one of which might turn out to be useless, would be rendered necessary to ascertain such right, the Court would assume jurisdiction to direct that an action on certain terms be brought in the first instance to ascertain the right, and that an injunction issue in the meantime. *The London and North Western Railway Company* v. *Smith*—Ch. 716

4. A Railway Company under the powers of their Act gave notice to the lessees of a factory and building, that they required a part of their premises. The lessee thereupon gave a counter notice, requiring the Company, under the 92nd section of the Lands Clauses Act, to take the whole. The Company took no further proceedings until the lease of the premises had expired. The lessees having remained in possession of the premises, the Railway Company, without serving any new notice on the defendants, had the value of their interest in the whole of the premises assessed, deposited the amount in Court, delivered a bond, and entered into possession of a part of the premises under the 85th section.

The defendants, conceiving that the Company had no right to proceed under the 85th section, sent in a claim, and gave them notice to issue their warrant to the sheriff to summon a jury to assess compensation under the 68th section.

The Company thereupon filed their bill to restrain such proceedings.

Negotiations had been entered into by the reversioners with the Company and with the defendants, which rendered it doubtful to what interest in the premises the latter was entitled.

On motion to dissolve an injunction granted ex parte:—*Held*, by the Lord Chancellor, affirming the decision of the Vice-Chancellor of England, that the injunction to restrain proceedings by the defendants under the 68th section be continued, until the rights of the several parties had been ascertained. *The South Western Railway Company* v. *Coward*—Ch. 703

LIABILITIES OF COMPANY.

See PRINCIPAL AND AGENT.
STATUTES (CONSTRUCTION OF).

LIEN.

See COSTS, 9.

MAJORITY AND MINORITY.

See AGREEMENT.

MANDAMUS.

A Railway Company gave notice to landowners, under the 8 & 9 Vict. c. 18, s. 18, that they required to purchase part of certain premises. The owners of the premises thereupon gave notice to the Company, under sect. 92, that they required them to purchase the whole of the premises, and a mandamus was obtained commanding the Company to issue their precept for summoning a jury to assess compensation for the whole:—*Held*, that although the 92nd section protects the owners from being obliged to sell a part, it does not compel a Company wanting a part only, to take the whole, and that the mandamus having claimed the whole, could not go for a part only. *Regina* v. *The London and South Western Railway Company*, 669

MANUFACTORY.

See INJUNCTION, 1.

OFFICERS OF COMPANY.

See STATUTES (CONSTRUCTION OF), 1, 2.

PARTICULARS OF DEMAND.

Where parties sue upon contracts arising out of railway projects, the particulars of demand must be as explicit as possible. *Prichard* v. *Nelson*, 20

PARTIES TO ACTION.

See CALLS, 1.
PLEADING, 7.

PAYMENT INTO COURT.

See PRACTICE, 2.

PLANS AND SECTIONS.

See RAILWAY CLAUSES ACT.

PLEADING.

See CALLS, 1, 7, 8.
PRACTICE.

1. The allegation in the general form for declaring, given by the 8 & 9 Vict. c. 16, s. 26, "that the defendant *is*" the holder of shares, means that he was so at the time the call was made. *Belfast and County Down Railway Company* v. *Strange*, 548

2. Assumpsit for money had and received. Plea, that the defendant and others were members of the provisional committee of an undertaking for making a railway; that twenty shares were allotted to the plaintiff; and that the defendant received from him 2*l.* 12*s.* 6*d.* on each share, amounting to 52*l.* 10*s.* That the plaintiff sought to recover back the said sum of 52*l.* 10*s.*, on the ground that the scheme had not been prosecuted within a reasonable time; that, after the passing of the 8 & 9 Vict. c. 28, it was, at a meeting held under that Act, resolved that the undertaking should be abandoned, and its affairs wound up; that the plaintiff's claim in this action was part of the affairs of the Company to be wound up; and that they had not been wound up, nor had a reasonable time for that purpose elapsed:—*Held*, bad on special demurrer, as amounting to non-assumpsit. *Owen* v. *Challis*, 537

3. Trespass for breaking and entering the plaintiff's close, and making a tunnel through it.—Plea, that the close was a public highway, and that the defendants, by Act of Parliament, were incorporated for the purpose of making a railway; that, before the passing of the Act, plans and sections of the railway, and also books of reference, had been deposited with the clerks of the peace, &c.; that by the said Act it was enacted, that, subject

to the provisions of that and the Companies Clauses Consolidation Act, and the Railways Clauses Consolidation Act, it should be lawful for the defendants to make and maintain the railway in the line and upon the lands described on the said plans, &c., and to enter upon, take, and use such of the said lands as should be required for that purpose; that the said close, in which &c., was delineated and described on the said plans, &c., and is such public highway; whereupon the defendants, under and by virtue of the said Acts, entered upon the said close, &c., under the surface thereof, in order to make, and did then so make under the said highway a tunnel, and in so doing committed the said trespasses.—Replication, that the close was required to be purchased and permanently used for making and permanently maintaining the railway; that the plaintiff, being the owner of the close for a term of years, subject to the said public highway, did not consent that the defendants might enter upon or take the close, nor did the defendants give any notice to the plaintiff to sell and convey the same to them, or that they required the same; nor did the defendants pay the plaintiff, or deposit in the Bank, any purchase-money or compensation for the interest of the plaintiff therein. That the defendants did not enter on the close for the purpose of merely surveying or taking levels, &c.; but for the permanent using and taking the same; and at the said time when &c., and thence hitherto, have used and now permanently use the said close, for the permanent purpose of the railway:—*Held*, on demurrer to the replication, that it must be taken on these pleadings, that the tunnel had been made with a view to its permanently forming part of the railway; and as it appeared that the defendants had not, before entry, paid the compensation due to the plaintiff, the plea afforded no defence to the action. *Ramsden* v. *The Manchester South Junction and Altringham Railway Company*, 552

4. Case by a reversioner. The declaration stated, that, at the time of the committing the grievances, a certain messuage was in the possession of H., as tenant thereof of the plaintiff, the reversion thereof then and still belonging to the plaintiff; and then complained of the defendant's pulling it down. The defendant traversed, that the messuage was in the possession or occupation of H., as tenant thereof to the plaintiff, nor did the reversion thereof belong to the plaintiff. The plaintiff, it appeared, was a lessee of an unexpired term in the premises, and had demised the same to H., as yearly tenant. H. had quitted the premises a short time before the committing of the alleged grievances, which were taken possession of by a third party. She had not, however, assigned her interest:—*Held*, that the meaning of the averment in the declaration was, that, at the time when the grievances were committed, there was in H. a right to the possession in point of interest, so that the plaintiff could sue as reversioner, and that the plea was proved. *Held*, secondly, that, in such case, the proper measure of damages was, by how much less the reversion would sell, in consequence of the injurious act of the defendant. *Hoskins* v. *Phillips*, 560

5. Assumpsit by creditors of D. The first set of counts was for work done &c. by D., and promises to him. The second set was for work done &c. by the plaintiffs, as executors, and promises to them. Second plea to the whole of the declaration, that D. projected an undertaking for a railway, and, in order to induce the defendant to become a member of the provisional

committee, agreed, in consideration thereof, to indemnify him from any professional or other charges on account of the said railway, and thereupon the defendant became a member of the provisional committee; that the said work and labour, monies, and accounts in the declaration were respectively done, paid, and stated by D., and by the plaintiffs, as his executors, in and about the surveying of the line of the said railway, and after the said promise of indemnity, and that defendant became liable to the said charges, and made the said promises, only in his character of member of the said committee; that the railway was afterwards abandoned, and the said work done and payments of money became useless to the defendant, and that any money which may be paid by, or damages recovered from, the defendant, will be wholly lost to the defendant, and he will be damnified contrary to the said agreement. Last plea, that the said D. caused the defendant to enter into the promises by fraud:—*Held*, on special demurrer, first, that the first plea was good to avoid circuity of action.

Secondly, that the last plea was properly pleaded to the whole declaration, as the defendant had a right to treat the work done, &c., by the plaintiffs as executors, as being done in respect of the previous contract with D.; and that if the testator, by fraud, procured the original contract, his fraud procured the implied promise arising from the performance of it by the plaintiffs. *Connop* v. *Levy*, 124

6. The second count of the declaration stated, that, by a certain deed between the plaintiff and the defendants, therein described as registered and incorporated in pursuance of the 7 & 8 Vict. c. 110, reciting the granting of certain letters patent to the plaintiff, and that the said Company (the defendants) had been duly formed under a deed of settlement for the working of the said patents, and that the said Company had been registered and incorporated under the provisions of the said Act; and further reciting an agreement for the sale of the patent. It was witnessed and covenanted that the plaintiff would join in an application for an Act, and would convey the patents to the Company, and that the sum of 15,000*l.* in cash should be paid to the plaintiff as soon as conveniently could be done, after the execution of the said articles, out of the money raised by the first instalments or calls on the shares in the said Company. Breach, that, although the Company, within a convenient time after the execution of the said articles, could and might, by calls and instalments on the shares, have raised the said sum, and a convenient and reasonable time for raising the said money and paying the same in cash to the plaintiff had elapsed, and although the Company had paid to the plaintiff 1000*l.*, yet that they had not paid the residue.

Pleas—3rdly, that the deed of settlement was obtained by fraud. 4thly, that the registry and incorporation were obtained by fraud. 8thly, that the Company was formed under a deed of settlement, to which the plaintiff was a party, by which it was, amongst other things, agreed, that the directors should pay to the plaintiff out of the first calls, after providing thereout a sufficiency to meet the necessary expenses of the Company, 15,000*l.* That no calls had been received sufficient to satisfy the necessary expenses and the said 15,000*l.*, or any part thereof. 21st, that the said Company was not incorporated by charter or Act of Parliament, nor was the same *duly and lawfully* registered and incorporated. 22ndly, that the Company required a certificate of complete registration; that, at the time of obtaining such certificate, the Com-

pany was not formed by deed or writing under the hands and seals of the shareholders:—*Held*, that the 3rd, 4th, 8th, and 22nd pleas were bad.

That the 21st plea was also bad; for if it meant a denial of the registration in fact, the defendants were estopped by their deed, and if a denial in fact was not meant, then that the plea was bad for putting in issue, matter of law.

Held, lastly, that the declaration was good on general demurrer, and that the breach was well assigned. *Pilbrow* v. *Pilbrow's Atmospheric Railway and Canal Propulsion Company*, 89

7. The declaration stated, that the plaintiffs had agreed with others to endeavour to form a Railway Company; that 2*l.* 2*s.* deposit per share was to be paid by the allottees. That the plaintiffs—the committee of management—allotted shares to the defendant upon the terms of the payment of the deposit by the defendant on or before a stated day, to certain bankers, of all which premises the defendant had notice. The declaration then averred mutual promises—the readiness of the plaintiffs to fulfil their part; and breach by defendant—non-payment of the deposit.

The defendant pleaded, 4thly, a traverse of the plaintiffs' readiness to fulfil their part of the agreement; 5thly, a traverse of the notice of the several premises in the declaration; 6thly, that before action brought the plaintiffs, without the consent of the defendant, abandoned their endeavours to form the Company, and the shares of the defendant were thereby worthless.

Held, on special demurrer to the pleas, that they were bad, and that the declaration was good.

Semble, that the plaintiffs were the proper parties to sue. *Duke* v. *Dive*, 65

PRACTICE.

See ALLOTTEE, 1.
BILL OF COSTS.
COMPULSORY POWERS, 2.
COSTS, 3.
DIVIDENDS.
EXECUTION, 1.
INJUNCTION, 1.
PROVISIONAL COMMITTEE.
PURCHASE-MONEY (IN COURT), 1.
STAYING PROCEEDINGS.

1. On application made by the churchwardens and overseers of a parish to have a sum of money, which had been paid into Court by a Railway Company for the purchase of certain buildings and land, paid out to them for the purpose of buying other land and erecting other buildings in substitution of those taken by the Company, the Court refused to make a summary order, and directed a reference to the Master. *Ex parte The Churchwardens and Overseers of Bicester, Re The Buckinghamshire Railway Company*—Ch. 205

2. The plaintiffs having brought separate actions against two directors of a Railway Company for the same amount, and the defendant in the one action having paid into Court a sum of 300*l.*, the Court allowed the defendant in the other action to plead payment into Court of the 300*l.*, without actually paying it in. *Rendel* v. *Malleson*, 146

3. Service of a petition on the solicitor of the Company not a good service under the 10th section of the Winding-up Act. *Re The Trent Valley and Chester and Holyhead Railway Company*—Ch. 622

4. Where a Company have no office, an affidavit of service of the petition upon a member of the Company must be produced. *Re The Tring, Reading, and Basingstoke Railway Company*—Ch. 621

5. The Master made an order for

delivery up of certain papers, deeds, &c., on which the solicitors of the Company claimed a lien for costs. Order of the Master discharged.

Held, that the words of the 28th and 66th sections of the Winding-up Act are controlled by those of the 58th. *Re The Oxford and Worcester Extension and Chester Junction Railway, &c.*—Ch. 628

6. The Court of Exchequer having in this term decided two similar cases as to the liabilities of a provisional committee-man, this Court considered themselves bound by those decisions, and refused to hear any argument in a case involving precisely the same point. *Barker* v. *Stead*, 45

7. It is no answer to a motion for leave to issue a scire facias against a former member of a Joint-stock Company, upon a judgment recovered against the public officer, that the judgment was fraudulently concocted; such defence must be raised by plea, or by motion to set aside the proceedings.

Where a rule to issue a scire facias upon a judgment recovered against the public officer of a Joint-stock Company, had been obtained by the plaintiff against a former member, under the 7 Geo. 4, c. 46, s. 13, which rule had been abandoned:—*Held*, that the plaintiff was not precluded from applying again to the Court for leave to issue a scire facias against the same party; and quære, whether he would be, if the first application had been finally disposed of by the Court?

Semble, that the general rule which prohibits the moving the same matter a second time, does not apply to a case of an application for leave to issue a scire facias on fresh materials.

The class of persons intended by the 13th sect. of 7 Geo. 4, c. 46, as "the members for the time being," are those who at the time of the execution were members of the Company; in proceeding, therefore, under that section, the proper course for a plaintiff who has recovered judgment against the public officer to pursue is, in the first instance to issue writs against those persons who are at that time members of the Company; but the plaintiff may proceed against the other classes which the statute renders liable, if he can satisfy the Court that every reasonable and proper effort has been made to obtain payment of the debt from those who are primarily liable.

Those persons who have become partners of a Joint-stock Company after the contract was completed, and have ceased to be so before judgment obtained against the public officer, are not subject to any liability under the Act, although they were partners at the time the action was commenced. *Dodgson* v. *Scott*, 654

8. The plaintiff having obtained judgment against a registered Joint-stock Company, in this Court, gave notice to a shareholder, pursuant to the 7 & 8 Vict. c. 110, s. 68, that application would be made to the Court *or* a Judge, for leave to issue execution against him on the judgment; a summons was accordingly taken out before a Baron of the Exchequer at chambers, which was dismissed, on the ground, that, as he was not a Judge of the Court in which the judgment was obtained, he had no jurisdiction.

Upon a subsequent application to the Court on the same notice:—*Held*, that the notice was exhausted by the application to the Judge at chambers; and that a second application could not be made on the same notice. It was therefore dismissed, with costs.

Those costs not being paid, the plaintiff served a fresh notice of application for a scire facias:—*Held*, that the Court would not decline to interfere, till those costs were paid, it not appearing that the party was unable to obtain those costs. Secondly, that the plaintiff was

not precluded from making a second application on the fresh notice.

The affidavits upon which the rule was obtained, stated that D. C. was a provisional director, and had signed the deed of settlement, which recited that the parties thereto had taken shares, and that no transfer by D. C. had been registered.

Held, that the affidavits sufficiently shewed that D. C. was a shareholder for the time being. *Semble*, a party who has once become a shareholder, continues so until he has complied with sect. 13, of 7 & 8 Vict. c. 110. *Cordon* v. *The Universal Gas-light Company*, 677

PRINCIPAL AND AGENT.

1. The employment of an agent for a particular purpose gives only the authority necessary for that agency under ordinary circumstances. Therefore, as it is not incident to the employment of a railway guard or station-master, to enter into a contract with a surgeon to attend a passenger accidentally injured on a railway, the Railway Company are not liable for services so rendered by a surgeon under such a contract. *Cox* v. *The Midland Railway Company*, 583

2. In an action against a provisional committee-man on a contract entered into by the committee of management appointed by the provisional committee, it is a question for the jury, whether the defendant appointed the managing committee his agents, to pledge his credit.

Where nothing else appears than that there is a managing committee appointed by the provisional committee, the jury ought not to conclude that the former is agent for the latter to pledge their credit, *Williams* v. *Pigott*, 544

PROVISIONAL COMMITTEE.

See WINDING-UP ACT, 6.

C. and A. were named in the prospectus of a Company provisionally registered, as members of the provisional committee, and, at their own request, had 150 shares reserved for them, in common with the other members of that committee. They afterwards refused to accept the shares, or to execute the Parliamentary deed or subscribers' agreement, and never acted in the affairs of the Company, and were not members of the managing committee. Two of the shareholders, on behalf of themselves and other shareholders, except the defendants, filed their bill against the members of both committees, including C. and A. and the secretary of the Company, charging the managing committee with acts of mismanagement, and praying, amongst other things not affecting the defendants C. and A., an account of the property and assets of the Company, including therein the several amounts then due from the defendants (including C. and A.), in respect of deposits on their shares, and also a receiver and an injunction, and further praying an account of the liabilities of the Company, and a due application of the assets. To this bill the defendants C. and A. demurred for want of equity:—*Held*, by the Lord Chancellor, confirming the judgment of the Vice-Chancellor of England, that the demurrer must be allowed, the plaintiffs having failed to shew by their bill that the demurring defendants were liable, that the plaintiffs had the right to sue them, or that they were necessary parties to the bill. *Bell* v. *Lord Mexborough*—Ch. 149

PURCHASE-MONEY (IN COURT).

See COSTS, 1, 3, 4, 5, 7, 9.
DIVIDENDS.
PRACTICE, 1.

1. Where money in Court, the pro-

duce of part of the glebe taken by a Railway Company, exceeded the proposed purchase by 20*l.*, the Court refused to pay the whole sum to the petitioner, and directed the surplus after payment of the purchase-money, to be invested, and the dividends paid to the vicar for the time being. *Ex parte The Vicar of Bredicot, Re The Worcester, Birmingham, and Wolverhampton Railway Company*—Ch. 209

2. A sum of money, part of a larger sum paid by a Railway Company for glebe land, ordered to be paid to the rector for the time being for his own use. *Ex parte The Rector of Little Steeping, Re The East Lincolnshire Railway Company*—Ch. 207

3. Under the 42nd section of the Eastern Counties Railway Act (which is in the same terms as the 69th section of the Lands Clauses Consolidation Act), money paid for the purchase of land taken compulsorily by a Company from a municipal corporation may be applied in paying off an incumbrance affecting other lands belonging to the same corporation. *Ex parte The Corporation of Cambridge, Re The Eastern Counties Railway Company*—Ch. 204

4. In order to obviate the necessity of repeated applications to the Court in cases where the purchase-monies of glebe lands had been paid into Court and invested, the form of the order was, that the dividends should be paid to the vicar for the time being, and churchwardens and overseers; or either of them. *Re The Buckinghamshire Railways, Ex parte The Churchwardens and Overseers of Bicester*—Ch. 702

RAILWAY CLAUSES ACT.

See ARBITRATION, 1.
STATUTES) CONSTRUCTION OF), 4.

A Railway Company, at the instance of the commissioners of paving, raised the height of a bridge over the railway, and made the gradient of the ascent 1 in 105, instead of 1 in 40, as shewn by the deposited plans and sections.

The plaintiff's premises would not have been reached by the incline, as exhibited in the deposited plans; but, by the alteration, an embankment five feet in height passed by two sides of that part of the plaintiff's premises which faced the street, partially obstructing the access and the supply of light and air.

The Vice-Chancellor of England having granted an injunction on the ground that, according to the deposited plans and sections, the Company had not power to make the alteration whereby the plaintiff's premises were affected: —*Held*, by the Lord Chancellor, discharging the order of the Vice-Chancellor of England, that, except where the plans and sections form part of the Act, they are referred to for the purposes of determining the datum line only.

That, in the present case, the plans and sections, although referred to, were not so incorporated into the Act, and did not form part of it, so as to preclude the Company from availing themselves of the powers conferred by the 16th section of the Railway Clauses Consolidation Act.

That the words of the 14th section of the General Act, "engineering works," apply to the line of rail only.

That the General Act contains no restriction as to the height of a bridge over the line of rail, the only restriction being as to the gradient of ascent of such bridge. *Beardmer* v. *The London and North Western Railway Company*—Ch. 728

RAILWAY, (MAKING PART ONLY.)

See DIRECTORS, 2.
SHAREHOLDER, 4.

REGISTER.

See CALLS, 2.
PLEADING, 6.

REVERSION—REVERSIONER.

See LANDS CLAUSES ACT.
PLEADING, 4.

SCIRE FACIAS.

See PRACTICE, 7, 8.

SCRIP CERTIFICATE.

See FORGERY.

SET-OFF.

See CONTRACT, 4.

SHAREBROKER.

See CONTRACT, 2, 3, 4, 5, 7.

SHARES—SHAREHOLDER.

See CALLS.
CONTRACT.
DAMAGES, 1, 2.
DEPOSIT.
PRACTICE, 7, 8.
STOCK EXCHANGE.
WINDING-UP ACT.

1. In assumpsit for not accepting and paying for scrip shares in a Railway Company, the defendant pleaded, that, after the 1st of November, 1844, divers persons, exceeding the number of twenty-five, were united in partnership and established as a Joint-stock Company, in England, for the purpose of executing works which could be carried into execution without the authority of Parliament; that the said Company had not been formed or established on or before the 1st of November, 1844, nor had the said Company been incorporated or authorised by statute; that the said Company had not obtained any certificate of complete registration under the 7 & 8 Vict. c. 110; that the said shares in the declaration were shares and interests in the said Company. Replication, de injuriâ. At the trial it appeared, that, in 1843, S., an engineer, went to India for the purpose of introducing railways there generally; that he proposed a line, for the execution of which the Company in question was established; and that certain persons met together there for the purpose of assisting him in getting up a Company; that, in July, 1844, he got a draft deed of settlement prepared in India, and that he brought it with him to England, where he arrived after the 3rd of November, 1844, and that, subsequently, prospectuses were issued. The Judge left it to the jury to say, whether the Company had been *commenced to be formed* before the 1st of November, 1844:—*Held*, that the direction of the Judge was right, the 26th section of the 7 & 8 Vict. c. 110, prohibiting the sale of shares in such a Company if the formation of it shall have been *commenced* after the 1st of November, 1844, and it shall not have obtained a certificate of complete registration; but that these facts did not support the issue.

Semble, that the plea, though bad on special demurrer, for not shewing that the Company had not been *commenced* to be formed before the 1st of November, 1844, was good after being pleaded to. *Baker* v. *Plaskett*, 117

2. A testator, by codicil, gave all the shares he possessed in a certain railway, and all his right, title, and interest therein, to his son and daughter equally.

At the time of his death the testator had twenty-two 100*l.* railway shares, on each of which calls amounting to 70*l.* had been paid, and the remaining sum of 30*l.* had been advanced by the testator, in his lifetime, under a power contained in the Railway Act, by which he was entitled to interest until the calls were made:—*Held*, that the legatees were entitled to the shares and dividends, and also to the sums advanced and the interest. *Tanner* v. *Tanner*—Ch. 184

3. The purchaser of railway shares on the London Stock Exchange, is bound to do all acts necessary to relieve the vendor from subsequent liabilities in respect of such shares, although no stipulation be made to that effect at the time of the contract. *Wynne* v. *Price*—Ch. 465

4. A Railway Company having obtained an Act of Parliament for the construction of a railway from London to Portsmouth, expressed an intention wholly to abandon the project, but subsequently, about one month before their powers for taking land compulsorily had expired, in consequence of an agreement with another Railway Company, they determined, with the assent of the majority of the shareholders present at an extraordinary general meeting, convened for that purpose, to complete four miles of the railway, as far as L., and delivered notices and entered into contracts for the purchase of land required for that purpose.

The plaintiff then filed his bill on behalf of himself and other shareholders, against the directors, praying an injunction.

Demurrer for want of equity overruled, and an order for an injunction to restrain the defendants from proceeding with their works, &c., with the view of completing the line to L., *only* issued. *Cohen* v. *Wilkinson*—Ch. 751

SPECIFIC PERFORMANCE.

See CALLS, 4.

A Railway Company, under the powers of their Act, with which the Lands Clauses Consolidation Act was incorporated, gave notice to the owner of their intention to purchase part of his property; but, not requiring immediate possession, they took no steps to complete the purchase. The landowner filed his bill, praying specific performance of the contract created by the notice. The Act provided the means of ascertaining the amount of purchase-money and compensation.

Held, that a Court of equity has jurisdiction, in a suit so instituted, to make a decree which will have the effect of compelling the Company to set the machinery provided by the Act into operation. *Walker* v. *The Eastern Counties Railway Company*—Ch. 469

STAMP.

See DEPOSIT.

The plaintiff applied by letter for thirty shares in a projected Company, and undertook to accept the same or any less number, and to pay the deposit. The letter of allotment appropriated to him ten non-transferable shares, and stipulated that the deposit should be paid on a certain day, and in default thereof that the committee should have the power of cancelling the allotment. In an action by plaintiff to recover back the deposit paid on the shares allotted:—*Held*, that these documents did not require a stamp. That the application for shares and letter of allotment did not constitute the contract under which the deposit was paid. *Vollans* v. *Fletcher*, 73

STATUTES (CONSTRUCTION OF.)

See ARBITRATION, 1, 3, 4, 5.
BANKRUPT COMPANY.
BOND.
BYE-LAW.
CALLS, 2, 3, 7, 8.
CARRIERS' ACT.
COMPULSORY POWERS, 2.
COPYHOLD.
COSTS.
DIRECTORS, 2, 3.
LANDS CLAUSES ACT.
PLEADING, 1, 3.
RAILWAY CLAUSES ACT.
SHARES, 1.
SPECIFIC PERFORMANCE.

1. Where, by the Act of incorporation of a Railway Company, the directors were empowered to appoint and displace any of the officers of the Company:—*Held*, that the appointment of an attorney to the Company need not be under seal; therefore that a notice of appeal against a poor-rate, signed by the attornies of the Company appointed by the directors, not under seal, was sufficient. *Regina* v. *The Justices of Cumberland*, 332

2. Under the provisions of an Act of Parliament incorporating a Railway Company, it was provided, that it should be lawful "for the sheriff of any county in which the works of the said railway shall be in progress of construction," to appoint constables, &c. "during the construction of the said railway and works." Constables were duly appointed, whose wages were paid by the Company up to the time when the railway was opened, with the sanction of the Board of Trade, for public traffic.

After the opening of the railway, a considerable number of workmen continued to be employed, but the Railway Company refused to pay their wages, on the ground, that, upon the true construction of the Act, the works of the railway were no longer "in progress of construction":—*Held*, by the House of Lords, on appeal from the Court of Session in Scotland, that the liability of the Company for the wages of the constables did not cease with the opening of the line, but continued so long as workmen were employed in completing any works on, or connected with, the railway. *The North British Railway Company* v. *Horne*, 231

3. By an old Act of Parliament giving a Company power to make a canal, it was provided, that nothing therein contained should affect the right of the owners of land to the mines and minerals lying within or under the lands to be made use of for the canal, and it should be lawful for such owners to work such mines, not thereby injuring, prejudicing, or obstructing the canal. And, further, that if the owner or worker of any coal or mine should, in pursuing such mine, work near or under the canal, so as, in the opinion of the Company, to endanger or damage the same, or in the opinion of the owner or worker of the mine, to endanger or damage the further working thereof, then it should be lawful for the Company to treat and agree with the owner; and in case of disagreement, certain commissioners were appointed to assess the amount of compensation.

The commissioners never having exercised their powers, it was thought expedient, for more easily settling claims for compensation, to incorporate the Lands Clauses Consolidation Act with the Canal Act, and an Act was passed for that purpose.

The defendants, in working their mine, approached so near as, in their opinion, to endanger the canal, and negotiations were commenced between the plaintiffs and the defendants as to the coals necessary to be left, but no terms were agreed on.

The defendants then gave notice of their intention to proceed to arbitration, under the Lands Clauses Consolidation Act, whereupon the Company filed their bill, and applied for an injunction:—*Held*, by the Lord Chancellor, discharging the order for an injunction granted by the Vice-Chancellor of England, that the defendants were justified in proceeding before the proper tribunal, to ascertain how much compensation they were entitled to.

Semble, that a Court of equity has jurisdiction, if it be satisfied that no injury will ensue from working the coal, to restrain a party from proceeding to arbitration under their Act. *Cromford Canal Company* v. *Cutts*—Ch. 442

4. At the trial of an issue, the question was, whether a railway at a particular place passed through a town within the meaning of the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 11. The Judge merely told the jury that the word "town" in the Act was to be understood in its ordinary sense:—*Held*, that this was a misdirection, and that the Judge should have given the jury such a definition as would have been a guide to enable them to decide the particular question before them. "Town" in the Act means the space on which the dwelling-houses are collected so near to each other that they may be said to be continuous. *Semble*, an open space occupied as a mere accessory to the convenience of dwelling-houses would also be in the town. *Elliot* v. *The South Devon Railway Company*—Ch. 500

STAYING PROCEEDINGS.

Where separate actions are brought against joint-contractors for the same demand, the Court, upon payment of the debt and costs in one action, will stay proceedings in the other actions, without costs. *Newton* v. *Blunt*, 29

STOCK EXCHANGE (USAGE OF).

See CONTRACT, 2, 3, 4, 5, 7.

SUBSCRIBERS.

See CALLS.

SUPPLEMENTAL BILL.

See INJUNCTION, 1.

TENANT FOR LIFE.

See DIVIDENDS.
PURCHASE-MONEY (IN COURT), 1, 2, 3.

TOWN.

See STATUTES (CONSTRUCTION OF), 4.

TRANSFER OF SHARES.

See CALLS, 4.
CONTRACT, 3, 4, 5.
PRACTICE, 8.
SHARES, 3.

USAGE OF STOCK EXCHANGE.

See CONTRACT, 2, 3, 4, 5, 7.
SHARES, 3.

WINDING-UP ACT.

See PLEADING, 2.
PRACTICE, 4, 5.

1. A Railway Company was provisionally registered, but did not obtain an Act of incorporation. The scheme having been abandoned, a petition was presented by a contributory, praying the absolute dissolution and winding up of the Company, under the 11 & 12 Vict. c. 45:—*Held* by the Lord Chancellor, reversing the decision of the Vice-Chancellor *Knight Bruce*, that such a Railway Company was within the Act, and that a Court of equity had jurisdiction to make an order to the effect prayed. *Ex parte Barber, In re The London and Manchester Direct Independent Railway Company (Remington's Line)*—Ch. 594

2. An allottee of twenty shares in a projected Company which was afterwards abandoned, received back a first instalment of 1*l.* 10*s.* per share in respect of his deposit of 2*l.* 15*s.* per share, and thereupon delivered up his scrip, and gave an undertaking to give such further receipt or discharge as might be required by the directors. He afterwards received a final dividend of 3*s.* 3*d.* per share. It did not appear that there were any debts, or liabilities, or any assets of the Company in the hands of the directors, although it was charged by the petition, that some of the directors had not paid up their deposits. The Court, under these circumstances, refused to make

an order under the above Act. *Ex parte Murrell, Re The London and South Essex Railway Company*—Ch. 612

3. In applications for the dissolution and winding up of the affairs of a Company, the Court will take into consideration the particular circumstances of each case; and if the Court, from the materials before it, think it not expedient or proper that a Company should be wound up, it is its duty to act upon that impression. *Ex parte Pocock, Re Direct London and Manchester Railway Company (Rastrick's Line)*—Ch. 607

4. A holder of scrip certificates in a Railway Company held to be a contributory within the meaning of the Act. *Re Rugby, Warwick, and Worcester Railway Company*—Ch. 611

5. A resolution to dissolve a projected Company had duly passed, under 9 & 10 Vict. c. 28, and the affairs of the Company were in the Master's office, under an order made in a suit instituted for winding them up. A petition was presented by a contributory of the Company, praying its dissolution, and that its affairs might be wound up, under the Act of 1848.—The Vice-Chancellor made the usual order. *Re The Warwick and Worcester Railway Company*—Ch. 619

6. A petition was presented by two members of the provisional committee of a projected Company, praying the usual order for dissolution and winding up of their affairs. It appeared that all the contributions for which the general body of shareholders were liable had been paid and expended:—*Held*, that the provisional committee, in respect of their liabilities inter se, were entitled to the order prayed. *Ex parte Hollingsworth, Re The Ipswich and Southampton Railway Company*—Ch. 623

7. Although a party may not actually have had his name inserted on the register of a Company as a shareholder, yet, if he has so acted, and his acts have been so far adopted, that it may be inferred that both parties have waived the observance of the necessary forms, he will be held to be a contributory within the meaning of the Act; his liability will, however, be limited to the time when his legal right to be registered accrued. *Ex parte Hall, Re The North of England Joint-stock Banking Company*—Ch. 624

8. The petitioner had agreed with other members of the Company to refer all matters in difference, and also the adjustment and settlement of the affairs of the Company to arbitration. The arbitrator had made his award, but it had not been taken up:—*Held*, that the petitioner was not barred from obtaining an order for winding up the affairs of the Company under the Act. *Re The Lancaster and Newcastle-upon-Tyne Railway Company*—Ch. 632

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